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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-counter-defendant-Appellee,

v.

VISTA PAINT CORPORATION,

Defendant-counter-claimant-Appellant.

No. 96-55670.
D.C. No. CV-94-00127-RT

ORDER*

Appeal from the United States District Court
for the Central District of California
Robert J. Timlin, District Judge, Presiding

Submitted Oct. 6, 1997**
Pasadena, California

Decided Nov. 4, 1997.

Before PREGERSON, D.W. NELSON, and HAWKINS,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Circuit Judges.

We affirm for the reasons stated in the district court's Findings of Fact and Conclusions of Law entered April 16, 1996.

All motions pending before this Court are denied as moot.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-counter-defendant-Appellee,

v.

VISTA PAINT CORPORATION,

Defendant-counter-claimant-Appellant.

No. 96-55670
D.C. NO. CV-94-00127-RT

Filed January 23, 1998

ORDER

BEFORE: PREGERSON, D.W. NELSON, and HAWKINS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has called for a vote to rehear this matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISTA PAINT CORPORATION,

Defendant.

CASE NO. EDCV 94-0127 RT.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

United States District Court, C.D. California.

Filed April 16, 1996.

The matter came on regularly for trial, United States District Judge Robert J. Timlin presiding. After having heard the arguments of counsel and examined the evidence presented, the Court makes the following findings of fact and conclusions of law:

I.

FINDINGS OF FACT

A. Amended Findings of Uncontroverted Facts and Conclusions of Law.

The following Findings of Fact are conclusively established by the Amended Findings of Uncontroverted Facts and Conclusions of Law, filed February 11, 1992 ("Amended Findings"), and the Amended Pretrial Order, filed January 3, 1993 ("1/3/94 Court Order"):

1. In 1984, as part of the State Implementation Plan ("SIP") for California to limit the VOC content of paint, the South Coast Air Quality Management District ("SCAQMD") and the San Diego County Air Pollution Control District ("SDCAPCD") adopted SIP Rules 113[*] and 67.0. These rules regulate non-flat architectural coatings, otherwise known as gloss or semi-gloss paints, which are commonly used to paint structures, mobile homes or pavement. In order to control air pollution from the manufacture and application of these coatings, the rules limit their VOC content to no more than 250 grams of VOC per liter of coating ("250 g/l VOC"), and forbid the sale, offer for sale, or application of any such paint exceeding these VOC limitations ("non-compliant coatings").

2. As background, local and regional government authorities under California law have primary responsibility for control of air pollution. Cal. Health & Safety Code § 40000 et seq. Two of these local authorities are the SCAQMD, which includes Los Angeles and Orange Counties, and the SDCAPCD, which includes San Diego County. These districts are empowered to adopt rules governing air pollution and to independently enforce them as state law. Id. at § 40001. As for the federal government, the Clean Air Act ("CAA") provides the EPA with independent authority to enforce federally approved air pollution control laws. Section 110 of the Act, 42 U.S.C. § 7410 (Section 7410), requires among other things that each state submit rules for emission limitations to be

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[*] [So in original and throughout remainder of opinion. The actual number of the rule is 1113.]

incorporated into the SIP, and enforced as federal law by the EPA. See 42 U.S.C. § 7413.

3. In 1985, the U.S. Environmental Protection Agency ("EPA"), pursuant to the CAA, approved SCAQMD Rule 113 and SDCAPCD Rule 67.0 as part of the SIP for California, to be enforced as federal law. 50 Fed. Reg. 3338 (January 24, 1985).

4. Vista's president was aware of these rules and their purpose in the time period between 1985 to 1987, to control VOC emissions. Vista was both a long-time manufacturer and seller of non-compliant coatings, having produced its "Trim-Kote" and "Proformer" brands with VOC's in excess of 250 g/l for over ten years. Vista offered these non-compliant coatings for sale for the five-year period preceding February 1987.

5. EPA met with industry trade associations in 1987, including the National Paint & Coatings Association and the Southern California Paint & Coatings Association, regarding its strategy for taking enforcement action against companies violating the 1985 VOC limitations set by law. EPA informed the industry that it would, as a matter of enforcement discretion, prioritize enforcement against those companies that did not cease the manufacture of non-compliant coatings by July 1, 1987, and who did not cease their sale of non- compliant coatings by September 1, 1987. Thus, while EPA retained the discretion to prosecute any company that violated the VOC limitation after January 24, 1985, EPA announced that those companies that persisted longest in their continuing violations of the Clean Air Act would be the first to be prosecuted.

6. On March 19, 1987, in order to determine the compliance status of the paint industry with the VOC limitations of federal law, EPA issued a request for information to a number of paint manufacturers, including Vista, pursuant to Section 114 of the CAA, 42 U.S.C. § 7414 ("Section 114

Request"). EPA required that each company report the volume of each non-architectural coating that it manufactured from February to May 1987, and the VOC content of each coating. Each company was given until April 7, 1987, to submit their first reports, and warned that non-compliance would subject them to civil penalties.

7. Vista did not respond to EPA's March 19, 1987 request. Vista's president cannot recall why Vista did not respond. Faced with Vista's recalcitrance, EPA subsequently issued an Administrative Order against Vista pursuant to Section 113(a)(3) of the CAA, finding that Vista had violated Section 114 of the CAA in failing to provide the requested information to EPA. 42 U.S.C. §§ 7413(A)(3)[*], 7414. Per its Order, EPA directed Vista to disclose by no later than April 16, 1987, the VOC content of the architectural coatings that it manufactured or distributed from February through May 1987.

8. Vista only partially complied with EPA's Administrative Order, responding in a letter postmarked April 20, 1987, by disclosing the VOC content of the architectural coatings it manufactured in February and March 1987 only. Vista's letter disclosed that its monthly paint production was approximately 25,000 gallons of coatings, with 55 percent by volume of the identified coatings exceeding the 250 g/l VOC limitation of federal law. Vista did not respond to EPA's Order regarding its coatings manufactured in April and May 1987, and did not provide the requested information.

9. EPA subsequently sought more specific information from the paint manufacturers regarding the trade name, volume and VOC content of each non-compliant coating sold in each California air quality district in March, April and May 1987. On May 15, 1987, EPA sent Vista a modified request for more

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* [So in original.]

specific information to supplant its initial request for information. Alternatively, EPA specified that the paint manufacturer could stipulate that it sold and/or offered for sale coatings in violation of the 250 g/l VOC limitation, and the month and location where the non-compliant paint was sold. Vista was advised that a failure to provide the requested information would subject Vista to an enforcement action for civil penalties of $25,000 per day of violation.

10. Vista responded by a letter dated June 12, 1987. Without disclosing the months in which it sold non-compliant coatings, Vista admitted to selling non-compliant coatings in the SCAQMD and the SDCAPCD. Vista's president also confirmed Vista's prior admissions in his sworn deposition testimony. Yet the information regarding the volume of each such non-compliant Vista coating sold and the location of their sale was available to Vista in March, April and May of 1987.

11. Based upon Vista's admission, EPA issued a Notice of Violation to Vista on June 19, 1987, pursuant to Section 113(a)(1) of the CAA.

12. EPA, in its continuing effort to compel Vista to comply with the law, sent Vista a second Section 114 request on June 19, 1987, requesting documentation of any quantities of Vista non-compliant coatings manufactured and sold in the subsequent July-October 1987 period. This request required Vista to (1) establish and maintain records regarding their non-compliant coatings; (2) report the volume of non-compliant coatings sold in August through October 1987 and their location of sale; (3) report the name and VOC content of the coatings sold; and (4) report the identity of coatings manufactured by Vista from July through October 1987.

13. The information requested by EPA's June 19, 1987, Section 114 request was available to Vista at the time of EPA's

request. EPA again warned Vista at that time of the $25,000 per day penalty if the requested information was not received.

14. In an effort to further accommodate the paint industry and Vista, EPA by its letter dated July 22, 1987, modified its second Section 114 request with a strictly tailored condition. In this letter, EPA stipulated that if Vista would commit to (1) the cessation of the manufacture of non-compliant coatings by July 1, 1987, (2) the cessation of all sales of non-compliant coatings by September 1, 1987 (a condition never fulfilled by Vista, see below), and (3) disclose the time and location of sales of non-compliant paint in August 1987 (another condition never fulfilled by Vista), that Vista would be relieved of its obligation to provide the other information requested by EPA in its prior June 1987 letter. Vista was still required to maintain all relevant records of its manufacture and sale of non-compliant coatings. EPA was explicit, however, that all conditions must be strictly complied with if Vista was to be relieved of any of its reporting obligations.

15. Vista continued to manufacture, sell and offer for sale its non-compliant coatings throughout April to October 1987, but did not provide any reports to EPA. Vista continued to manufacture non-compliant coatings in April, May and June of 1987, and continued to sell and offer for sale its non-compliant coatings in the Los Angeles and San Diego areas throughout June, July, August and September 1987. Although Vista continued to sell non-compliant coatings, Vista submitted no report of its August sales as requested in EPA's July 22, 1987, letter and no report as required by EPA's June 19, 1987, letter. EPA, per the CAA Section 113, 42 U.S.C. § 7413, gave notice to the appropriate state air pollution control agency of this enforcement action.

16. On August 19, 1987, Vista's president, Eddie R. Fischer, telephoned William Wruble of EPA Region IX to ask for more time to sell his non-compliant coatings. After

discussing Vista's situation, Mr. Fischer stated that "he had no choice but to sell the [non-compliant] paint past September 1, and was planning to do so." Mr. Fischer then stated that "he would (could) litigate if he had to, since the option was to go out of business."

17. Mr. Wruble denied Vista's request for additional time to sell its non-compliant coatings, and explained that Vista's failure to take EPA's enforcement authority seriously was not a reason to grant it additional time to sell non-compliant coatings. Mr. Fischer then said that he "didn't think it was our [EPA's] intention to put him in jail, although he'd be willing to pay a 'reasonable' fine to be able to continue to sell his violating coatings."

18. Vista was also warned by the local SDCAPCD to cease its sale of non-compliant coatings by September 1, 1987, a warning Vista received at least by July 28, 1987. Vista, however, continued to sell non-compliant coatings throughout September 1987. Vista admits that such non-compliant coatings remained offered for sale throughout Vista's San Diego stores in September 1987. Vista also continued its refusal to respond to EPA's request for information.

19. Further evidence that Vista sold non-compliant coatings after September 1, 1987, is provided where inspectors from the SDCAPCD purchased the Vista-brand "Trim-Kote" coating, a non-compliant coating, from Vista's retail outlet on Kearney Villa Road in San Diego, California, on September 2, 1987. The SDCAPCD's laboratory analysis revealed that the purchased paint had a VOC concentration of 387 g/l, well above the permissible 250 g/l permitted by SDCAPCD Rule 67.

20. The SDCAPCD inspectors purchased a second gallon of non-compliant coating, a Vista paint under the brand name "Proformer," from the same Vista San Diego store on

September 22, 1987. The SDCAPCD laboratory analysis revealed that the purchased paint had a VOC concentration of 381 g/l, well above the permissible 250 g/l permitted by SDCAPCD Rule 67.

21. Both Vista's records and its president corroborate these violations. Vista's April 16, 1987, report to EPA identifies that its "Trim-Kote" and "Proformer" paints as non-compliant coatings, have a VOC concentration of 340 and 380 g/l, respectively. Vista's president confirmed that Vista's "Trim-Kote" and "Proformer" paints purchased by the SDCAPCD inspectors would be expected to have VOC concentrations in excess of 250 g/l. Mr. Fischer further admits that non-compliant coatings were sold in San Diego on September 2, 1987. Based upon these illegal sales, the SDCAPCD cited Vista with two misdemeanor Notices of Violation for its violations of SDCAPCD Rule 67. Cal. Health & Safety Code § 42400.

22. Faced in September 1987 with enforcement action from the SDCAPCD (EPA had not yet taken its enforcement action against Vista), Vista sought a variance from the SDCAPCD Hearing Board.

23. As background, the variance procedure is a creation of the California Health & Safety Code §§ 42350 et seq., and provides the applicant with a procedure to obtain relief from a local rule (not a federal rule) under certain strictly limited conditions. Cal. Health & Safety Code § 42350. In part, an applicant cannot obtain a variance unless the applicant attests that it "is, or will be, in violation of Section 41701 or of any rule, regulation, or order of the district." Cal. Health & Safety Code § 42352(a). Thus, by applying for a variance, Vista further admitted that it was in violation of SDCAPCD Rule 67 and/or its intent to violate that rule for the express purpose of selling the remainder of Vista's non-compliant paints within the next 90 days.

24. Vista was subsequently unable to persuade a majority of the SDCAPCD Hearing Board at its September 24, 1987, hearing that a variance was warranted, and Vista obtained no variance relief at any time from the SDCAPCD. Vista applied to the SDCAPCD Hearing Board for reconsideration, then dropped its request. Vista represented instead that it had removed its non-compliant paint from its San Diego stores as of October 12, 1987, but after the September 24, 1987, variance hearing. Vista's president explains that he removed the non-compliant coating from his San Diego stores because those coatings were not selling well. Vista subsequently paid a fine to the SDCAPCD for its violations of their local rules.

25. The VOC's emitted by Vista's paint are a primary precursor of ozone, or smog, which the EPA has designated as a major air pollutant. 42 U.S.C. §§ 7408, 7450, 7451; 40 C.F.R. ¶¶[*] 50.1, 50.9. The 13,000 gallons of coating offered for sale in September 1987 in San Diego by Vista would release approximately eight tons of VOC hydrocarbons.

26. Ozone pollution causes serious adverse health effects, including coughing, reduced lung capacity, respiratory infection and possible permanent lung damage. There is also evidence that the young, the elderly, and those persons with respiratory ailments (such as asthmatics) are among those who are particularly susceptible to the adverse effects of ozone. At certain concentration levels, ozone irritates the respiratory system and causes coughing, wheezing, chest tightness and headaches. Due to its irritation nature, ozone can aggravate asthma, bronchitis and emphysema. Some studies indicate that chronic exposure to fairly low levels of ozone may reduce resistance to infection and alter blood chemistry or chromosome structure. At higher concentrations [of ozone], hospitalization becomes a possibility.

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[*] [So in original.]

27. Ozone also causes significant damage to the environment, where ozone can destroy vegetation, reduce crop yield, and damage exposed materials by causing cracking, fading and weathering. Moreover, clear evidence shows that ozone damages economically, ecologically and aesthetically important plants. When exposed to ozone, major annual crops produce reduced yields. Some tree species suffer injury to needles or leaves, lowered productivity and, in severe cases, individual trees can die.

28. EPA has through the federal Clean Air Act attempted to control and regulate VOC emissions from a variety of sources, including paint manufacturers. In 1987, EPA found that 40 paint companies, including Vista, were in violation of the federal CAA's limitation on VOC concentrations in their coatings. All 40 paint companies received a Notice of Violation, and 38 announced their intent to cease non-compliant paint sales. Only one company announced its intent to continue to violate the VOC restrictions, to intentionally violate the law despite repeated warnings from the regulatory agencies, and to disregard the effects of its violations on human health and the environment: that company was Vista.

29. After EPA referred this matter to the U.S. Justice Department for enforcement action, Vista for the first time produced a letter it purportedly prepared on or about August 4, 1987, and sent to EPA, that represented that Vista had ceased its manufacture of non-compliant coatings on June 30, 1987, and "will not offer for sale any non-compliant coatings after September 1, 1987."

30. This representation has in fact proven to be false. Vista's president admits that sales of such coatings continued well after September 1, 1987. In addition, there is no copy of the letter in EPA's files or any other indication that it was received by EPA prior to the date it was produced to the U.S. Department of Justice in 1989. Vista's president testified that

he cannot recall ever seeing the purported Vista August 4, 1987, letter before 1989, when it was first produced to the U.S. Department of Justice.

31. Vista appears to have had no intention of ceasing its sale of non-compliant coatings in August 1987, where Vista's president announced to EPA at precisely the same time that Vista would continue its sales of non-compliant paint after September 1, 1987, and Vista in fact did so. Vista's president said that Vista would go bankrupt if it could not sell its non-compliant paint, a statement that again cannot be reconciled with Vista's purported August 1987 letter.

32. The United States propounded interrogatories and requests for production of documents on May 1, 1991, seeking this identical information requested by EPA in 1987. Vista responded with groundless objections with no legal basis, and flatly refused to provide the information or produce the relevant documents. The United States then brought a motion to compel Vista to comply with its discovery requests. As a result, this Court ordered that Vista (1) specifically identify by September 27, 1991, the quantity of its non-compliant coatings manufactured and sold in 1987, and (2) produce the requested documents at the U.S. Attorney's Office by no later than October 25, 1991, again mirroring the information requested by EPA in 1987.

33. Vista did not identify its non-compliant coatings with a verified response per this Court's Order, and as required by Section 114 of the CAA, but instead directed the United States to look through unidentified documents at its warehouse. Moreover, Vista has refused to make those documents available for inspection until October 25, 1991.

34. Vista has already provided its sworn response stating unequivocally that no documents exist regarding its sale or offer for sale of non-compliant coatings prior to August 30,

1987. See Vista's "Supplemental" Responses No. 2 and 3. This unexplained disappearance of Vista's documents is directly contrary to EPA's Section 114 requirement that Vista retain those documents.

35. Vista's sworn responses to the United States' Requests for Admission ("RFA") cannot be reconciled with the deposition testimony of Vista's president, where he admits precisely the same facts that Vista denies in its RFA responses. For example, Vista's president admits that he knew that Vista was selling non-compliant coatings in September 1987. Fischer Depo. p. 188. But see Vista RFA No. 27. There are numerous other examples. See Vista RFA Nos. 1, 2, 3, 5, 6 and 7. See especially Vista's evasive response to RFA No. 13 and 14.

B. Memorandum of the Ninth Circuit Court of Appeals (Court of Appeals).

The following Findings of Fact are conclusively established by the Memorandum in United States v. Vista Paint Corp., No. 92-55160 (9th Cir., Sept. 24, 1992) ("Memorandum"), and the "1/3/94 Court Order."

1. Vista had ample opportunity to submit comments on the inclusion of the local rules in the California State Implementation Plan ("SIP") pursuant to Section 307(d) of the CAA, and to challenge EPA's approval of the inclusion of those rules in the SIP pursuant to Section 307(b)(1) of the CAA.

2. Vista admits that it did not halt the sale of non-complying paint by September 1, 1987.

3. Vista was manufacturing, selling and offering for sale non-complying coatings in 1985, when the volatile organic compounds ("VOC") limit became effective.

4. In June 1987, Vista told EPA that it was selling non-complying paint in the SCAQMD and the SDCAPCD.

5. Vista's president, Eddie Fischer, admitted that Vista had been violating the rules since 1985 and was doing so before and after September 1, 1987.

6. Vista also admitted that these violations in the SDCAPCD continued until October 12, 1987.

7. Fischer expressly testified in his deposition that non-complying paint was offered for sale after September 1, 1987, in San Diego.

8. EPA's second information request required Vista to establish and maintain certain records and to submit certain reports. Vista's president admitted that the kind of information EPA sought was available when EPA requested it.

9. If Vista had stopped offering for sale and selling non-complying paint by September 1, 1987, it would have been relieved of some of the requirements in this request. However, Vista continued to sell such paint after September 1, 1987. Vista's president understood that the requirements of the second request were waived only if Vista stopped selling non-complying paint by September 1, 1987. Although Vista admittedly continued to sell non-complying paint after September 1, 1987, it never provided the information requested by EPA.

10. Vista [has a] history of full compliance.

11. The duration of violation [is settled].

12. SDCAPCD previously assessed a $500 penalty.

13. The $500 Vista paid to the SDCAPCD [was] on a fine originally set at $2,000.

14. Vista obtained a "significant economic benefit" that supported a "substantial penalty."

15. Vista has improperly failed to disclose information which it has or had in its exclusive possession to assess the precise economic benefit to it due to its illegal offer for sale and sale of non-compliant coatings.

16. Vista failed to submit admissible evidence to controvert the U.S.A.'s showing of Vista's significant economic benefit.

17. EPA's ability to gather information on potential violations is vital to enforcement of the CAA. It is irrelevant that no ozone was formed from Vista's failure to supply the information.

18. Vista's president was told by EPA and the San Diego District that, if it did not stop selling non-complying paint by September 1, 1987, enforcement would follow. There was nothing unusual or perplexing in these instructions to Vista.

C. Findings of Fact After Trial.

The following Findings of Fact are established by the evidence at the trial on certain remanded civil penalty issues.

1. Vista is a company whose primary operation consists of manufacturing and selling at retail paint and paint products. It is the largest manufacturer, distributor and retail seller of paint in Orange County, California. Vista manufactures approximately 25,000 gallons of paint each month for sale at its stores in California. It has 28 retail locations in Southern California, including San Diego County. Its total sales in 1990, 1991 and 1992 exceeded $44,000,000 in each year, and its total

sales in 1993 approximated $47,000,000. Its general office and sole paint manufacturing plant are located in Fullerton, California. It has 400 employees.

2. In 1994, Vista's net worth was approximately $12,000,000 and its net current assets were approximately $8,553,000.

3. Eddie Fischer is the sole owner and president of Vista. Mr. Fischer has ultimate control of all operational, financial and managerial decisions of Vista. Vista is a Subchapter S corporation for federal tax purposes, which causes all taxable income of Vista to be allocated to Mr. Fischer and is taxed at the appropriate individual tax rates.

4. For the years following the filing of this lawsuit for which Vista has filed income tax returns, Vista's gross profits have remained relatively steady: $20,063,000 for 1990; $19,543,000 for 1991; and $19,596,000 for 1992. Because of certain transactions between Vista and Mr. Eddie Fischer, its sole equity owner, Vista's reportable net income since this lawsuit was filed has been drastically reduced: $2,241,000 in 1990; $582,000 in 1991; and a net loss of $464,000 in 1992.

5. By reason of certain transactions between Vista and Mr. Eddie Fischer, the total shareholder equity in Vista is $2.9 million.

6. However, Vista's purported financial condition of only $2.9 million in stockholder equity has not precluded Vista's ability to obtain a $3 million dollar letter of credit from Bank of America posted with the District Court. See Vista's motion for release of Rule 62(d) security, filed on March 2, 1993. In its financial analysis of Vista, exhibit 107, Bank of America partly concludes at page 2 that Vista lowered its retained equity because of the instant action:

"In June 1991, Mr. Fischer was advised that it would be advantageous for him to withdraw $7,950M in retained earnings from Vista. This represented the Sub chapter S earnings upon which he has paid income taxes, since Vista became a Sub S corp. in 1986. This amount was lent to the company and subordinated to the Bank. This accounting action was also taken to lower the retained earnings because of the EPA suit." (Emphasis added).

7. On March 10, 1992, Vista posted with this Court a Standby Letter of Credit from Bank of America in the amount of $3,176,723 to secure the summary judgment in the amount of $3,020,000 entered against Vista by Judge Real.

8. Bank of America concluded that Vista is easily capable of financing a $3.02 million dollar judgment against it:

"Judge Manuel Real of the US District Court imposed a $3MM fine . . . even if the total fine would be levied Vista Paint could put together the financing to repay the fine over a relatively short period of time."

9. The Court of Appeals on page 10 of its Memorandum discussed the seriousness of the violation factor as one of the seven criteria provided in 42 U.S.C. 7413(e) for consideration by the Court in determining the amount of penalty to be assessed. It stated that as to the application of that factor to the Section 110 violation (selling or offering for sale in violation of SIP) there was a triable issue of material fact regarding how many gallons of non-compliant coatings Vista was offering for sale during September 1987 in San Diego County. The Court finds that Vista offered for sale at least 13,000 gallons of non-compliant coatings in San Diego in September 1987. It also finds that Vista sold at least 70 gallons of non-compliant coatings in San Diego during the period September 1, 1987 to October 12, 1987.

10. In August 1985, SCAQMD amended Rule 1113 to extend to 1989 California paint companies' ability to sell non-compliant paint up to 380 g/l VOC. SCAQMD's decision was known to Vista.

11. In January 1986, SDCAPCD amended its Rule 67.0 to extend to September 1, 1986, California paint companies' ability to sell non-compliant paint up to 380 g/l VOC in San Diego. SDCAPCD's decision was known to Vista.

12. Both districts subsequently submitted their new time extension revisions to EPA as revisions to the federal SIP. These proposed revisions to extend the time for compliance with their local rules which imposed a 250 g/l VOC deadline under state law, did not constitute federal law.

13. The SDCAPCD revision proposed to extend the deadline for compliance with the 250 g/l VOC limitation to September 1, 1986. The revision was submitted to the California Air Resources Board ("CARB"), then to EPA on August 12, 1986, with less than one month remaining before September 1, 1986, when the proposed local rule extension would expire by its own terms. Because of the short time remaining before it became a moot proposal, EPA did not act on SDCAPCD's proposed extension of the federal SIP as to non-compliant coatings. At all times, the federal SIP remained in effect and required compliance with the 250 g/l VOC limitation by all members of the coatings industry, including Vista.

14. The SCAQMD proposed revision to Rule 1113 was submitted to EPA and formally disapproved by EPA in 1989. See 54 Fed. Reg. 5236 (February 2, 1989).

15. Vista's violations continued in both the SCAQMD and the SDCAPCD (in violation of the SDCAPCD rule) throughout 1986 and a portion of 1987, in violation of the federal SIP.

16. The Court finds that the August 4, 1987, letter by Vista, addressed to EPA (Exhibit 13) as a response to EPA's information request of July 22, 1987 (Exhibit 12), was not sent or delivered to EPA.

To the extent that any of the foregoing Findings of Fact are deemed to be Conclusions of Law, they are incorporated into the following Conclusions of Law stated in II.B below.

II.

CONCLUSIONS OF LAW

A. The following Conclusions of Law are the law of the case by reason of the Conclusions of Law made in the Amended Findings and the 1/3/94 Court Order.

1. Vista illegally offered for sale and sold non-compliant coatings with a VOC content in excess of 250 g/l during the time period between and including December 3, 1985, through October 12, 1987, in violation of the SIP rules identified as SCAQMD Rule 1113 and SDCAPCD Rule 67, and continued to violate those rules more than 30 days after having received a Notice of Violation from EPA on June 24, 1987.

2. Vista has, therefore, violated Section 110 and 113 of the Clean Air Act, 42 U.S.C. §§ 7410, 7414, from December 3, 1985, to October 12, 1987, a total of 578 (sic) days of violations and there being no genuine issue of material fact remaining, the United States is entitled to summary judgment thereon.

3. Vista illegally and unreasonably failed to respond to EPA's June 19, 1987, request for relevant information in violation of Sections 113 and 114 of the CAA, 42 U.S.C. §§ 7413, 7414, by its failure to (a) establish and maintain records regarding their non-compliant coatings, (b) report the volume

of non-compliant coatings sold in August through October 1987 and their location of sale; (c) report the name and VOC content of the coatings sold; and (d) report the identity of coatings manufactured by Vista from July through October 1987.

4. Vista has, therefore, violated Sections 113 and 114 of the Clean Air Act from August 26, 1987, to November 18, 1991, a total of 1177 (sic) days of violations and, there being no genuine issue of material fact remaining, the United States is entitled to summary judgment thereon.

5. Section 113 of the CAA, 42 U.S.C. § 7413(b), provides for imposition of a civil penalty against Vista of not more than $25,000 per day of violation for (1) the sale or offer for sale of non-compliant VOC paint in violation of CAA Section 110, and (2) for the failure to respond to EPA's request for information in violation of CAA Section 114. 42 U.S.C. § 7413(b)(2), (4). For purposes of computing the appropriate civil penalty, the penalty period begins when the source first commits the violation and not later when the NOV is issued. This Court will first determine the maximum penalty allowable and then consider any mitigating circumstances.

6. Vista's failure to respond to EPA's request for information is equally serious. More than four years after the information was requested by EPA, then by the U.S. Department of Justice in this lawsuit, Vista has not yet responded to EPA's request that Vista specify the quantity of non-compliant paint manufactured and sold in the summer of 1987.

7. There is injury to the public when responsible parties such as Vista do not respond to official inquiries pertaining to its Clean Air Act compliance and liability. EPA must expend a significant portion of its limited monies to prosecute these actions, and the violator escapes effective regulation of its

pollution by hiding its violation and challenging EPA to find the information on its own, if it can. Where the regulatory program is designed to protect public health, as with the Clean Air Act, it is even more important to deter violators.

B. The Conclusions of Law stated in II.A above, and are applicable to all of the foregoing Findings of Facts.

1. Jurisdiction and Venue.

a. This Court has subject matter jurisdiction over this action pursuant to Section 113(b) of the CAA, 42 U.S.C. § 7413(b) and 28 U.S.C. §§ 1331, 1345 and 1355, and personal jurisdiction over the parties.

b. Venue in this district is proper pursuant 42 U.S.C. 7413 and 28 U.S.C. § 1391(c).

c. Vista is a corporation covered by the CAA, 42 U.S.C. § 7602(e).

d. EPA satisfied the requirement that notice of this action be given to the proper state air pollution control agency pursuant to the CAA, 42 U.S.C. 5.7413(b).[*]

2. Generally Applicable Law Regarding Issues Remanded For Trial.

a. The penalty criteria are set forth in CAA Section 113(e)(1), 42 U.S.C. § 7413(e)(1) (Section 7413(e)(1). In assessing civil penalties, CAA Section 113(e)(1) provides that the Court shall consider the following factors: (1) the size of the business and the economic impact of the penalty on the business; (2) the seriousness of the violation; (3) the violator's

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[*] [So in original.]

full compliance history; (4) good faith efforts to comply; (5) the duration of the violation as established by any credible evidence; (6) payment by the violator of penalties previously assessed for the same violation; (7) the economic benefit of noncompliance, and such other factors as justice may require.

b. Neither statutory nor case law (which the Court could find) dictates that the Court in weighing such factors must give more weight to any one factor than to any of the other factors.

c. Under Section 7413(e), civil penalties are awardable for violations of Sections 7410 and 7414 on days which precede the date a Notice of Violation is served by EPA on the violator. U.S. v. SCM Corp., 667 Fed. Supp. 1110, 1122-1123 (D. Md.1987).

d. The general purposes of a civil penalty are three fold: (1) retribution, (2) deterrence, and (3) restitution. Tull v. U.S., 481 U.S. 412, 422 (1987).

e. In determining the civil penalty, the Court "should give effect to the major purpose of a civil penalty: deterrence." United States v. T & S Brass and Bronze Works Inc., 681 F. Supp. 314, 322 (D.S.C. 1988), aff'd. in relevant part, 865 F.2d 1261 (4th Cir.1988), 28 ERC, 19 Envtl. L. Rep. 20, 857.

f. The Court of Appeals in its Memorandum remanded this action for trial only as to the application of certain Section 7413(e)(1) factors and then for a determination of the civil penalty under Section 7413(b).

3. Penalty Factors Remanded For Trial.

The following three statutory penalty factors were remanded for trial: (1) economic impact/size of business; (2) good-faith

efforts to comply; and (3) seriousness of violation. In addition, the interest of justice non-statutory factor of government delay remained as an unresolved issue of fact.

a. Size Of Business/Economic Impact.

Regarding the Court's consideration of the first two criteria of Section 7413(e)(1): size of the business and the economic impact of civil penalties on Vista's business (sometimes characterized collectively as the "ability to pay"), the Court, based on the facts and applicable law, considers them inextricably interrelated in their application to Vista.

Vista is an expanding business with increasing annual gross sales revenues in the range of 45 to 47 million dollars annually. It has a healthy financial structure with considerable assets and net worth, annual net income (see Findings of Fact I C 1 and 2 above). Its earning capacity and borrowing capacity are such that the total civil penalties the Court adjudicates against it in this case will not undermine its financial structure and place it in jeopardy of "going out-of-business." Vista is capable of paying the penalties which will be ordered by the Court. The Court concludes that those two factors do not support a non substantial civil penalty.[1]

b. Vista's Good Faith Efforts To Comply.

(i) Section 7410 Violations.

Although Vista had received on June 24, 1987, a Notice of Violation from EPA regarding sales of non-compliant coatings in violation of the architectural coatings rules contained in the California federally approved State Implementation Plan

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[1] This conclusion is made notwithstanding certain financial transactions since 1990 between Vista and Mr. Eddie Fischer which cause Vista to appear on financial statements to be less financially stable than it is.

("SIP") (Exhibit 10), it proceeded to sell such non-compliant coatings into November 1987. Vista's president admitted that in September 1987, it offered for sale in San Diego County 13,000 gallons of such coatings and sold 35 to 70 gallons of those coatings in that county.

Vista knowingly and intentionally violated federal law from at least December 3, 1985, to October 12, 1987, ignoring during that period repeated warnings by EPA and the June 1987 Notice of Violation. Vista made a considered decision to offer to sell and sell non-compliant coatings in violation of Section 7310 and risk penalties rather than obey the law.

During this time period, Vista knew of the federal law regulating the VOC content of its coatings and prohibiting its offering for sale and selling non-compliant coatings.

(ii) Section 7414 Violations.

Vista made no real good faith effort to comply with Section 7414 and respond to EPA's information requests. It did not respond to the March 19, 1987, request. Vista submitted incomplete responses to EPA's April 20, 1987, administrative order and transmitted inadequate responses to EPA's information requests of June 19, 1987, and July 22, 1987, in part by not providing the required reports. Vista never responded to those portions of the information requests asking for specific quantities of non-compliant paint manufactured and sold in the summer of 1987.

Vista advised the EPA that it would litigate if it had to and would continue to sell its non-compliant coatings regardless of the law, even if it had to pay a "reasonable" fine for doing so.

The Court of Appeals at page 7 of its Memorandum pointed to Mr. Fischer's statement that Vista's employees spent three days attempting to compile the information sought by EPA's

Section 114 information request and this is evidence of good faith. In fact, the documents which Vista's employees purportedly used to compile the information sought by EPA are Vista's sales receipts and such were inspected by the United States. But, these receipts were not responsive to the information requested.

Vista's corporate state of mind was to engage in a pattern of continued non-cooperation with Vista's enforcement efforts by withholding the documentation of its violations or by providing incomplete information regarding such while it continued to sell and offer to sell non-compliant coatings after the Notice of Violation. The Court concludes that such non good faith conduct supports a substantial penalty.

c. Seriousness of Vista's Violations.

(i) Section 7410 Violations.

The unlawful emissions of VOC's into the atmosphere of the SCAQMD and SDCAPCD from the application of non-compliant coatings sold by Vista between 1985 and 1987, estimated to be 13 tons per month, exacerbated the ozone problem in both districts. This calculation is based on an estimate of Vista's sale of 11,300 gallons of such coatings each month. The government was not able to ascertain the actual amount because Vista failed to comply with EPA's information requests for the actual volumes of such coatings sold or offered for sale during that period.

Findings of Facts I A 25 through 27 above describe the effects of ozone on human health and the environment. Vista's non-compliant coatings as sold and applied by its customers, contributed appreciably to the ozone content in the two districts. If Vista had complied with Section 7410, there would have been a major reduction in atmospheric pollutants in SCAQMD and SDCAPCD.

Based on the uncontradicted testimony of doctors C. Shepard Burton, Ph.d.[*], and Jack D. Hackney, M.D., the VOC emissions from the application of Vista's non-compliant coatings, however, would have no measurable negative impact on human health and the environment of the SCAQMD and SDCAPCD. Therefore, the seriousness of Vista's 7410 violations support a moderate penalty.

(ii) Section 7414 Violations.

Based on Conclusion of Law II A 7 above, and CAA's statutory scheme which makes its effectiveness depend in large part on the members of the regulated industries maintaining and keeping required records of their operations and then submitting complete, accurate and timely reports regarding such to EPA when requested, the seriousness of the 7314 violations supports a moderate to substantial penalty.

d. Government Delay As An Interest of Justice Mitigating Factor.

(i) EPA Delays In Reviewing Proposed SIP Provisions.

The period of time consumed by EPA in reviewing and making its decision on the proposed revisions by SCAQMD and SDCAPCD to extend the time to comply with SIP as to manufacturing, offering to sell and selling non-compliant coatings was not unreasonable. See General Motors Corp. v. U.S., 496 U.S. 530, 541 n. 4, 110 L. Ed.2d 480, 110 S. Ct. 2528 (1990).

As to the proposed revision to Rule 113, SCAQMD submitted it to EPA on November 12, 1985, and it was

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[*] [So in original.]

disapproved on February 2, 1989. In the period 1985 through 1989, EPA's delay in processing and acting on proposed revisions to SIP by local districts was attributable to statutory ambiguities, policy issues not resolved on a national basis, adverse court decisions affecting EPA's ability to process certain types of revisions and lack of resources. (See deposition testimony of Mr. Howekamp).

Another important factor was whether the proposed revision was controversial. The proposed revision to Rule 113 was very controversial because it provided for a four year relaxation period before it became effective. Many issues regarding this proposed revision were being discussed in the coatings industry and in the governmental agencies having regulatory authority over pollutants emitted into the atmosphere. Further, the SCAQMD had not provided enough information to support its request. Consequently, EPA had to do its own investigative work to clarify some of these issues. This slowed down the review process. (See deposition testimony of Mr. John Ungvarsky.) Additionally, as required by law, EPA submitted the proposed Rule 113 revision and its recommended disapproval to the Office of Management and Budget ("OMB") on December 12, 1986, and OMB did not report its concurrence until May 14, 1988.

Regarding SDCAPCD's proposed revision to Rule 67.0, there was no unreasonable delay by EPA in reviewing it. The revision was submitted to EPA on August 12, 1986. Because the revision became moot less than one month after it was submitted to EPA, EPA did not act on it.

In any event, even if there were unreasonable delays in acting on the proposed rule revisions, Vista was not prejudiced by them because Vista violated federal law before and after the rule revisions were submitted to EPA. Vista's violations continued in both the SCAQMD and the SDCAPCD (in violation of the SDCAPCD rule) throughout 1986 and 1987.

The effect of the local rule relaxation in the SCAQMD had no effect on Vista's violations of federal law in the SCAQMD by virtue of 42 U.S.C. § 7416, and no effect on Vista's violations of both federal and local law in the SDCAPCD.

Further, Vista was aware as early as 1985 that EPA was not inclined to allow the extensions as proposed by the districts.

Therefore, having concluded that the delays by EPA in reviewing the proposed SIP revisions were reasonable, such delays do not mitigate the amount of the civil penalties to be imposed.

(ii) EPA/Department of Justice ("DOJ") Delay In Initiating Civil Prosecutorial Action.

EPA's delay in taking enforcement action against Vista for its Sections 7410 violations during the period 1985 to October 12, 1987, was reasonable because during that period EPA was collecting and evaluating a great amount of information, including input from the coatings industry, and was engaged in lengthy discussions with the local districts regarding enforcement policy. Only in the Fall of 1987, did EPA refer the matter to the Department of Justice for prosecutorial consideration. Such delay caused no prejudice to Vista. See Conclusions in II 3 d(i) above.

As to the Section 7414 violations, the prosecutorial delay was unreasonable from June 21, 1989 through January 18, 1991. On June 21, 1989, the EPA and DOJ announced in a press release that on that date the DOJ was going to file a civil penalty enforcement action against Vista in U.S. District Court (Exhibit 638). But, DOJ did not do so until December 5, 1990.

Vista was prejudiced by such delay because from June 21, 1989 to January 18, 1991, DOJ knew that Vista was maintaining the legal position that it had complied with Section 7314 by timely and complete responses to EPA's information

requests. See the letter from Joseph J. Armao, Vista's attorney, to Gerald F. George, attorney, Enforcement Section, Department of Justice. Such delay supports a moderate reduction in the penalty for the period June 21, 1989 to January 18, 1991.

4. Penalty Factors Not Remanded For Trial.

a. Vista's Full Compliance History.

Although Vista had no history of non-compliance with the CAA before its violations of Sections 7410 and 7414, the extent and degree of such knowing and intentional violations demonstrate a history of non-full compliance. The application of this factor supports a substantial penalty.

b. Duration of Vista's Violations.

Vista's violations of Sections 7410 and/or 7414 spanned a period of almost six years. Such duration of violations supports a substantial penalty.

c. Vista's Payment of Penalties Previously Assessed For The Same Violations.

Vista was assessed by SDCAPCD $2,000.00 in penalties for two separate sales of non-compliant paints in that district after September 1, 1987, in violation of its Rule 67.0. Vista paid only $500.00 towards the fine.

The fact that Vista paid $500.00 as a penalty to SACAPCD[*] in regards to two sales, which this Court has found also constitute violations by Vista of Section 7410, is considered by this Court as a slightly mitigating factor

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[*] [So in original.]

respecting the penalty to be assessed against Vista for violation of Section 7410.

d. Economic Benefit To Vista From Non-Compliance.

Vista received significant economic benefit from its violations of Section 7410 by avoiding the cost of eliminating the sale of non-compliant coatings, including nonsalability of any inventory of non-compliant paint in stock. It also avoided the manufacturing and marketing costs of switching certain of its brands to a compliant coating status. Although many of Vista's competitors also were selling non-compliant coatings in the SCAQMD and SDCAPCD during the period December 3, 1985 to September 1, 1987, in violation of Section 7410 and, therefore, Vista had no competitive advantage over them, other coatings manufacturers and retailers were in compliance. As to the latter group, Vista derived an economic benefit from its non-compliance with Section 7410.

Further, Vista's failure to comply with Section 7414 and provide the information and records sought by EPA's information requests preclude the Court from determining the actual economic benefit to it from violating Section 7410. The Court infers from such non-disclosure that the records, which were in the exclusive possession of Vista, would confirm this Court's conclusion that Vista obtained significant economic benefit from its offering to sell and selling non-compliant paints during December 3, 1985 to October 12, 1987, in violation of Section 7410.

The application of this factor supports a substantial penalty.

5. Civil Penalty.

The Court has weighed all those factors in Section 7413(e)(1), as applied to the facts determined after trial and to

the facts previously adjudicated by Judge Real's summary judgment and affirmed by the Court of Appeals. It concludes:

a. Regarding Vista's Section 7410 violations, the Court assesses a civil penalty of $500.00 per day for each of Vista's 568 days of violations from December 3, 1985, to June 24, 1987 (the date Vista received its Notice of Violation from EPA),[2] and $2500.00 per day for each of Vista's 110 days of violation from June 24, 1987, to October 12, 1987, a total of 678 days. The total Section 7410 civil penalty is $559,000.00.

b. Regarding Vista's Section 7414 violations, the Court assesses a civil penalty of $500.00 for each of Vista's 665 days of violations from August 26, 1987, through June 21, 1989 (the date of the EPA/DOJ's press release), and $250.00 per day for each of Vista's 879 days of violation from June 21, 1989, through November 18, 1991, a total of 1544 days.[3] The total Section 7414 civil penalty is $552,250.00.

To the extent that any of the foregoing Conclusions of Law are deemed to be Findings of Fact, they are incorporated into the Findings of Fact, as stated in I. C above.

DATED: April 16, 1996

/s/ Robert J. Timlin
ROBERT J. TIMLIN
United States District Judge

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[2] Judge Real's Amended Findings calculated the days covered by such period to be 468 days.

[3] Judge Real's Amended Findings calculated the total days to be 1177 days.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISTA PAINT CORPORATION,

Defendant.

VISTA PAINT CORPORATION, Counterclaimant-Appellant,

v.

UNITED STATES OF AMERICA,

Counterdefendant-Appellee.

VISTA PAINT CORPORATION,

Third-Party Plaintiff-Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY; SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; SAN DIEGO AIR POLLUTION CONTROL DISTRICT; AIR RESOURCES BOARD; TECHNICAL REVIEW GROUP;

Third-Party Defendants-Appellees.

No. 92-55160.
D.C. No. CV-90-6449-R

MEMORANDUM*

Appeal from the United States District Court for the Central District of California, No. CV-90-6449-R; Manuel L. Real, Chief District Judge, Presiding.

Argued and Submitted August 19, 1992
Pasadena, California
Filed September 24, 1992

Before: TANG and HALL, Circuit Judges, and WALKER,** District Judge.

Vista Paint Corporation ("Vista") appeals from the district court's summary judgment in favor of the government finding Vista liable for violations of the Clean Air Act ("CAA") and awarding the United States ("USA") civil penalties and attorneys fees. Vista also appeals the dismissal of its counterclaims and third-party complaint against the Environmental Protection Agency ("EPA"), California Air Resources Board ("ARB"), South Coast Air Quality Management District ("SCAQMD"), and San Diego Air Pollution Control District ("SDAPCD").

The district court had jurisdiction over the enforcement action pursuant to 42 U.S.C. § 7413(b) and 28 U.S.C. §§ 1331, 1345, and 1355. Jurisdiction over the third-party complaint and counterclaim was disputed. We have jurisdiction over this

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Vaughn R. Walker, United States District Court Judge for the Northern District of California, sitting by designation.

timely appeal pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand this action to the district court.

I.

Vista contends that the district court erred in granting motions striking certain of Vista's affirmative defenses and dismissing Vista's counterclaims and third-party claims for want of subject matter jurisdiction and for failure to state a claim.

A. Invalidity claims and defenses.

As Vista had ample opportunity to submit comments on the inclusion of the local rules in the California state implementation plan ("SIP") pursuant to section 307(d) of the CAA, and to challenge EPA's approval of the inclusion of those rules in the SIP pursuant to section 307(b)(1) of the CAA, the district court lacked subject matter jurisdiction over the third-party complaint, the counterclaim, and the affirmative defenses dealing with invalidity.

B. Estoppel claims and defenses.

Assuming that there was jurisdiction over the estoppel claims and defenses, the district court correctly dismissed these claims and defenses for failure to state a claim. Even if the EPA had promised not to exercise its enforcement discretion against those paint manufacturers who ceased sales of non-complying paint by September 1, 1987, and that promise was sufficient to estop EPA, Vista admits that it did not halt the sale of non-complying paint by that date. Accordingly, any "promise" would be inapplicable to Vista and it could not

prevail on its estoppel theory as a matter of law.[1] Accordingly, the district court properly dismissed the claims and defenses based on estoppel for failure to state a claim.

II.

Vista also contends that the district court erred in finding that Vista violated the CAA by selling or offering for sale non-complying paint, and by refusing to comply with EPA's information request.

A. Paint sale liability.

There was no genuine factual dispute precluding summary judgment as to Vista's liability for selling or offering for sale non-complying paint. Vista was manufacturing, selling and offering for sale non-complying coatings in 1985 when the volatile organic compounds ("VOC") limits became effective. In June 1987, Vista told EPA that it was selling non-complying paint in the SCAQMD and the SDAPCD. In his deposition, Vista's President, Eddie Fischer, admitted that Vista had been violating the rules since 1985 and was doing so before and after September 1, 1987. Vista also admitted that these violations in the SDAPCD continued until October 12, 1987.

Vista did not raise the issue that the dates of the sales were not proved for Sundays and holidays until after summary judgment had been entered. In his declaration in opposition to summary judgment, Fischer denied that Vista offered for sale thousands of gallons of non-complying paint. However, Fischer expressly testified in his deposition that non-complying paint was offered for sale after September 1, 1987, in San Diego. A party may not recant sworn testimony in order to

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[1] Vista also argues that USA is estopped due to "EPA's variance representations." However, Vista did not raise this argument until its post-judgment motion. See infra Section IV.

defeat a summary judgment motion. Juardo v. Eleven-Fifty Corp., 813 F.2d 1406, 1410 (9th Cir.1987). Accordingly, as no issue of fact or law remained, summary judgment as to liability for non-complying paint sales was proper.

B. Compliance with information request.

There was no genuine factual dispute precluding summary judgment as to Vista's liability for refusing to comply with EPA's information request. EPA's second information request required Vista to establish and maintain certain records and to submit certain reports. Vista's President admitted that the kind of information EPA sought was available when EPA requested it. If Vista had stopped offering for sale and selling non-complying paint by September 1, 1987, it would have been relieved of some of the requirements in this request. However, Vista continued to sell such paint after September 1, 1987. Vista's President understood that the requirements of the second request were waived only if Vista stopped selling non-complying paint by September 1, 1987. Although Vista admittedly continued to sell non-complying paint after September 1, 1987, it never provided the information requested by EPA. Accordingly, the court did not err in granting summary judgment as to liability for Vista's refusal to comply with EPA's information request because no issue of fact or law remained.[2]

III.

Vista also contends that the district court erred in summarily awarding civil penalties. Due to the factual nature of many of the factors the district court was required to consider in

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[2] Vista's argument that the EPA had no authority to require the sales data and that it had sufficient cause to act as it did were only raised in its post-judgment motion. See Section IV.

determining the civil penalty, summary judgment was improper.

Section 113(e)(1) of the Clean Air Act requires that:

> In determining the amount of any penalty to be assessed under this section . . . the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1) (1992 Supp).[3]

A. Section 113(e)(1) factors.

1. economic impact/size of business

In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to the economic impact of the penalty on Vista's business. The court below specifically noted in its findings:

> Vista is a major manufacturer, distributor and retail seller of paint with its total sales last year exceeding 50 million dollars . . . . Imposition of the penalty assessed below would

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[3] The 1990 Amendments became effective on November 15, 1990. USA filed its complaint on December 3, 1990. Accordingly, the Amendments apply to this case.

amount to approximately six percent of Vista's sales in a single year of operation.

In his declaration, Fischer stated that Vista's overall sales for fiscal 1991 were about "$45 million and profits were approximately two million dollars. Since then, sales have been flat but profits have declined." In addition, Fischer declared that "[i]mposition of the fine sought by the government in this case, would result in the destruction of my business and the loss of 400 number of jobs [sic] in the Southern California area." USA contends that Fischer's statements did not give the court any financial information to help the court make its determination. While Vista presented no business records, tax returns, affidavits of accountants to controvert the USA claim that the imposition of the full amount of the penalty would amount to less than eleven percent of Vista's sales in one year, Fischer's declarations raise a genuine issue of material fact. Accordingly, the court erred in granting summary judgment as to this penalty factor.

2. full compliance history

The district court held that despite Vista's history of full compliance, a substantial penalty was warranted. As there was no factual dispute, summary judgment as to this factor was proper.

3. good faith efforts to comply

In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to its state of mind. A court should be wary of granting summary judgment when good faith is in question. See White v. Roper, 901 F.2d 1501, 1503-06 (9th Cir.1990); Hotel & Restaurant Employees Union v. Rollison, 615 F.2d 788, 793 (9th Cir. 1980). In his declaration, Fischer stated that Vista made every attempt to cooperate with the EPA. USA contends that there are no material facts in

dispute regarding good faith. However, the mere fact that Vista offered for sale and sold non-complying paint after September 1, 1987, does not establish that Vista acted in bad faith.[4] As there was a genuine issue of material fact, summary judgment was improper as to this factor.

In addition, the court erred in summarily finding that Vista acted in bad faith in failing to respond to the information request. In his declaration, Fischer stated that Vista attempted at all times to cooperate with the government's request. Fischer also stated that three Vista employees spent three days trying to compile the requested data. There were contested issues of material fact.[5] Vista's good faith was a question of fact that should not have been decided on summary judgment.

4. duration of violation

The district court correctly ruled that the duration of violation supported a substantial penalty. Vista's argument that any violation occurred only on the day of the deadline, but did not continue thereafter, is meritless. The CAA explicitly provides for penalties for each day that Vista fails to respond to an information request. 42 U.S.C. § 7413(b) (1992 Supp).

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[4] At summary judgment, Vista argued that the issue of state of mind was "relevant to the seriousness of any violation." As good faith is irrelevant as to the seriousness of the violations, the court correctly refused to consider good faith under that factor. Vista did not argue that its state of mind was relevant to its good faith efforts to comply. This error is likely due to the failure of USA to bring its complaint under the 1990 CAA Amendments. As good faith is a factor that the district court was required to consider, summary judgment as to this issue was not proper.

[5] Vista's contention that EPA's "promise" that any deficiencies in Vista's responses would excite "immediate" action, and its settlement letter that told Vista that EPA had "enough information to make a settlement offer," led Vista to believe that it had satisfied the information request, was not raised until the post-judgment motion.

5. payment of penalties previously assessed

SDAPCD previously assessed a $500 penalty. Vista argues that the court "appears to have given no weight to SDAPCD's evaluation of the proper penalty." This argument is meritless. The district court was not obligated to accept $500 as the proper penalty. The district court considered the $500 Vista paid to the SDAPCD on a fine originally set at $2,000.

6. economic benefit of noncompliance

The district court found that Vista obtained a "significant economic benefit" that supported a "substantial penalty." While there may have been a factual dispute as to this issue, the district court recognized that "Vista has improperly failed to disclose information which it has or had in its exclusive possession to assess the precise economic benefit to it due to its illegal offer for sale and sale of non-compliant coatings." The court also found that Vista failed to submit admissible evidence to controvert USA's showing of Vista's significant economic benefit. Therefore, summary judgment was proper as to this penalty factor.

7. seriousness of the violation

The court found that the seriousness of the violation supported a substantial penalty. In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to the effects of its emissions on human health. The only document filed by Vista in opposition to summary judgment was a declaration by Fischer. Vista offered no documentary evidence related to the quantity of paint offered for sale to controvert the government's claims as to the potential health effects of the 13,000 gallons of paint it alleged Vista had offered for sale in San Diego in September 1987. USA contends that its claim was based on Fischer's sworn

testimony before the San Diego Hearing Board that he had "13,000 gallons of paint in the San Diego district."

In its opposition, Vista represented that it had only sold 34 gallons of paint in September 1987 in the SDAPCD. But, in his supporting declaration, Fischer estimates that Vista sold at least 70 gallons. Fischer's declaration raises a genuine factual dispute as to the number of gallons offered for sale. Therefore, this element of the seriousness factor was not properly disposed of on summary judgment.

Vista also argues that any delay or lack of completeness in providing the 1987 sales data had no adverse impact on the public. This argument is meritless. EPA's ability to gather information on potential violations is vital to enforcement of the CAA. It is irrelevant that no ozone was formed from Vista's failure to supply the information. See United States v. Charles George Trucking Co., 823 F.2d 685, 689 (1st Cir. 1987) (importance of compliance with information requests).

B. Non-statutory factors.

1. governmental delay

In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to the effect of EPA's inaction on the district's proposed SIP revisions. In General Motors Corp. v. United States, 496 U.S. 530, 541 n. 4 (1990), the Supreme Court found that "the statutory remedies for EPA inaction include . . . a request pursuant to § 113(b) . . . for reduction or elimination of penalties during any period in which unreasonable agency delay results in prejudice." See also United States v. SCM Corp., 667 F. Supp. 1110, 1128 (D. Md 1987) (government delay should neither mitigate against imposition of a substantial penalty nor act to enhance the penalty amount). Vista made such a request at summary judgment.

Vista argues that EPA delayed from 1985 to 1987 in notifying the industry that it would attempt to enforce the federally approved, but locally superseded, rules. Vista also argues that the district court failed to properly consider EPA's delay in acting on the proposed SIP revisions and in bringing this action. Vista contends that had the EPA rejected the revisions earlier, it would have made none of the paint sales. The "mere failure by governmental agencies to prosecute . . . does not allow a court to reduce a penalty." Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64, 81 (3rd Cir. 1990). EPA is only required to act on revisions of SIPs within a reasonable time, not necessarily within four months. General Motors Corp., 496 U.S. at 536-42. USA contends that the EPA's inaction on the San Diego proposed revision was reasonable as it was submitted less than a month before September 1, 1986. Whether this and the other delays were reasonable was a question of fact that precluded summary judgment as to this factor.

2. unusual and perplexing nature of regulation

Vista did not bring up this argument until its post-judgment motion. Vista cites only United States v. Louisiana-Pacific Corp., 682 F. SUPP. 1122 (D. Colo. 1987), to support its argument that its penalty should have been reduced because of the "unusual and perplexing" nature of the regulatory scheme. Whatever the complexity of the underlying legal basis for EPA's actions, Vista's President was told by EPA and the San Diego District that, if it did not stop selling non-complying paint by September 1, enforcement would follow. There was nothing unusual or perplexing in these instructions to Vista.

3. reliance

This argument was brought forth in Vista's post-judgment motion. The district court was not bound by Louisiana-Pacific

to consider "justifiable and detrimental reliance." Accordingly, the court did not abuse its discretion in denying the post-judgment motion as to this issue.

IV.

Unfortunately, Vista intertwined the distinct issues addressed on summary judgment with those addressed only in its post-judgment motion.[6] Vista never expressly argued in its opening brief that the district court erred in denying its post-judgment motion. Even in its reply brief, Vista's arguments were, at best, unclear. Vista did not even touch on any of these arguments in its opening brief. Accordingly, we refuse to consider these arguments.

V.

We affirm the district court's decision to grant motions striking certain of Vista's affirmative defenses and dismissing Vista's counterclaims and third-party claims for want of subject matter jurisdiction and for failure to state a claim. We also affirm the district court's summary judgment as to liability, and its denial of Vista's post-judgment motion. However, we reverse the district court's summary judgment as to the civil penalty, and remand to the district court for trial on the penalty issues.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[6] After thorough review of the district court record, we conclude that the following issues were raised for the first time in Vista's post-judgment motion: Vista's liability for pre-notice of violation sales, the burden of proof regarding the dates of any sales, abuse of prosecutorial discretion, USA's failure to follow EPA's penalty policy, constitutional excessiveness, EPA's authority to require the sales data, and Vista's sufficient cause to act.

APPENDIX E

DECLARATION OF EDDIE R. FISCHER

I, EDDIE R. FISCHER, hereby declare as follows:

1. I am the President and the sole shareholder of Vista Paint Corporation ("Vista").

2. Vista began as a company in approximately 1957. However, the original name of Vista was Paint & Masonry Supply. It consisted of a small paint store located in Garden Grove, California. I originally had a partner whose name was Walt Jacobson. In about 1958, my partner and I began to manufacture paint. Our first line of paint products was called Kolor-Kote and was designed to be applied on concrete. Our original manufacturing plant was in a small garage also located in Garden Grove.

3. In approximately 1959, we moved our company to a new location in Stanton, California. This new facility was approximately 2,000 square feet in size. One half of it was devoted to a store which sold paint products and related materials. The rest of our facility was devoted to the manufacture and production of paint products. At our new location, in addition to manufacturing and selling Kolor-Kote, we developed a new line of paint called Acri-Bond. This new product line was designed for all purposes, including interior and exterior, as well as dry wall, masonry and concrete. At about that same time, we changed the name of the company to Grove Paints.

4. In approximately 1965, we relocated to a new 7,00-square foot facility also in Stanton, California. The new facility was both a manufacturing plaint, as well as a retail store outlet. During this time period, we continued to develop and

manufacture new water-base paint products, such as Dura-Glide.

5. Approximately one year later, we opened a new factory facility behind our retail store outlet in Stanton in order to develop and manufacture future product lines.

6. In or about 1969, we opened our first satellite retail outlet in Costa Mesa, California.

7. Throughout the 1970s, Vista enjoyed a moderate growth pattern and continued to open up new retail locations in Orange County.

8. In or about 1970, we changed the name of the company to Vista Paint Corporation. Vista Paint Corporation was a "C" corporation. The shareholders of the company were myself and Walt Jacobson.

9. In approximately 1975, Walt Jacobson sold his interest in Vista to me and I became the sole shareholder of Vista.

10. In the late 1970s, we began to make plans to open a new factory, warehouse, general offices, as well as a retail store outlet in Fullerton, California. This project took several years to develop. In or about 1981, we opened our new facility in Fullerton.

11. Our current operations are housed in a building of approximately 134,000 square feet in size. Vista's operations initially took up approximately 80,000 square feet of that space and currently we occupy approximately 110,00 square feet of this building.

12. Approximately 12,000 square feet of our facility is now devoted to our retail store. This store sells the Vista line of architectural coatings and related products. In addition, we sell spray equipment and related components. Also, we sell wall

coverings, mini blinds, and related items from our retail location.

13. The balance of our facility is devoted to our general offices, manufacturing and warehouse facilities. We take special pride in the nature of our equipment, quality control and environmental awareness at Vista. For example, when we first moved into our new location in 1981, we put into place state-of-the-art equipment for manufacturing and recycling. This technology includes dust-recycling and water-recycling systems. As far as I know, Vista was the first California paint corporation to be involved in 100% recycling of waste products which are generated during the manufacturing process.

14. Throughout the 1980s, Vista manufactured both water-base and oil-base paints. Approximately 80% of our production was in the water-base paint area. I believe that Vista enjoyed technological superiority over its competitors in the manufacturing of water-base paints based upon Vista's historical focus on this technology. In fact, our new plant in Fullerton was almost exclusively designed for the research, development, and manufacture of water-base architectural coatings lines. In addition, solvent-based architectural coatings are more difficult to deal with because solvent is flammable and additional safety and environmental steps need to be taken in the manufacturing process of solvent-base paints. As a result, water-base paints tend to be slightly more profitable for Vista to manufacture.

15. As a consequence, Vista had no particular incentive to emphasize its manufacturing of solvent-base architectural coatings during the 1980s. Indeed, the only reason for carrying those product lines was because the market, especially paint contractors, continued to demand solvent-based architectural coatings for a variety of applications. I believe, and I think painting contractors in Southern California concur, that there

are particular applications which can only be met by the use of properly manufactured solvent-based coatings.

16. I have a vague memory that in or about the late 1970s, the South Coast Air Quality management District ("SCAQMD") began to become involved in attempts to limit the volatile organic compounds ("VOCs") in architectural coatings. However, Vista's compliance with these rules and regulations was handled by Jerome Fischer, or Vice President of Operations, as well as by Joe Ramirez who was our Technical Director.

17. During the 1980s, Vista continued to expand into other Southern California counties, including San Diego County, Riverside County, San Bernardino, and Los Angeles County. By 1987, Vista had approximately 14 retail outlets in these various counties and $24 million in gross sales.

18. Until the early part of 1987, it was my clear understanding that Vista was required to comply with environmental guidelines which were imposed either by SCAQMD or the San Diego Air Pollution Control District ("SDAPCD"). We rarely, if ever, heard anything about requirements from the Environmental Protection Agency ("EPA") or the California Air Resources Board ("CARB").

19. In or about March 1987, I remember that I learned from either Jerome Fischer and/or Joe Ramirez that, for the first time, the EPA was demanding some manufacturing or sales information from Vista. We were quite concerned at Vista because we had historically never been required to answer to EPA in terms of providing information or adjusting our product lines to meet those requirements.

20. In addition, during the same time period, I had occasional conversations with other executives of different California paint companies, and they too expressed to me

concern and confusion about these new demands from the EPA for voluminous data from their companies as well.

21. I relied on Jerome Fischer and Joe Ramirez to gather the necessary data to comply with these EPA demands. It has always been the policy of Vista to fully and immediately comply with any information demand from any governmental agency which has jurisdiction over our company.

22. Accordingly, I was quite concerned to receive Exhibit 504 on or about April 13, 1987. This document, addressed to my attention, stated that somehow Vista was in violation for failing to comply with an information request from the EPA. I spoke with Jerome Fischer and Joe Ramirez to inquire about the status of the EPA's request. They told me that they were doing their best to pull together the voluminous materials demanded by the EPA and had hoped to receive an extension of time within which to comply. Jerome Fischer further advised me that he had attempted to reach Mr. Wruble at the EPA for such an extension and Mr. Wruble had not returned his telephone calls. I urged Jerome Fisher and Joe Ramirez to immediately comply with EPA's request. I was advised that they did so on or about April 16, 1987. Joe Ramirez and Jerome Fischer assured me that Vista would diligently comply with all requests from EPA.

23. On or about May 15, 1987, I received another information request from the EPA. This is Exhibit 507. I was very bewildered and confused by this second information request by EPA. First, the information request "withdrew" the March 19 information request we had been working hard to respond to and which, in my view, we had finally responded to completely. Second, this information request made no mention of the so-called "violation" which had been assessed against Vista for failing to comply with the March 19, 1987, request. Third, we were unclear about power and jurisdiction of the EPA in this area. We had always looked to SCAQMD and, to

a lesser extent, SDAPCD, for guidance in complying with environmental regulations. It was unclear to us, both at Vista and in my conversations with other paint company executives, what EPA was attempting to do in this area. Nevertheless, I forwarded this second information request to Jerome Fischer and Joe Ramirez and told them promptly to respond to the EPA's demands.

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24. On or about May 29, 1987, I drafted and mailed to the EPA a letter which is Exhibit 508. The purpose of this letter was to seek the assistance from the EPA which they had offered to provide in their May 15, 1987, letter. I had been trying for some time to contact Mr. William Wruble of the EPA who was listed as the point of contact at that organization. However, Mr. Wruble never returned my telephone calls. I had hoped to receive from Mr. Wruble clarification of the second and highly confusing information request from the EPA. Accordingly, my May 29, 1987, letter was an attempt to receive a return telephone call and/or assistance from the EPA. However, I never received a telephone call or return letter from Mr. Howekamp. Nor did I receive any follow-up communication from Mr. Wruble, despite my request.

25. I have reviewed Exhibit 541, the Minutes of the June 8, 1987, Architectural Coatings Task Force meeting. This refreshes my memory that in or about June 1987, we at Vista became aware from various industry sources that we could no longer manufacture non-flat, non-specialty architectural coatings with a VOC level in excess of 250 g/l. We further learned that we could no longer sell such coatings after September 1, 1987. Accordingly, we made a corporate decision at vista to discontinue those lines of non-flat, non-

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[*] [So in original.]

specialty architectural coatings which had 380 g/l VOC as of July 1, 1987.

26. In or about June 1987, we made a corporate decision to respond to the May 15, 1987, information request by stipulating as we believed we were permitted to do. I have reviewed Exhibit 509 which is a letter from Philip S. Patterson, Vista's Chief Financial Office in June 1987. This document further refreshes my memory that we determined to cease the manufacture and sale of 380 g/l non-flat, non-specialty architectural coatings as the EPA demanded we do.

27. I was very concerned and confused when, on or about June 19, 1987, I received a second notice of violation from the EPA, Exhibit 511. We were quite surprised to learn that, by stipulating to the EPA May 15, 1987, information request, we would then be found to be in violation of EPA regulations.

28. We were even more confused when we received Exhibit 512, a June 19, 1987, third information request from EPA. This third request demanded information about the manufacture and sale of our paint products for the months of August, September and October 1987. In addition, the third information request demanded manufacturing information for 380 g/l VOC coatings for the months of July though October 1987. This did not seem to pertain to Vista because we had already determined to cease the manufacture of those coatings as of July 1, 1987.

29. The third information request from EPA was modified by the EPA's fourth information request, dated July 22, 1987, Exhibit 513. This was also the first official written order from EPA to cease manufacture of 380 g/L VOC coatings by July 1, 1987, an and to cease sales of such coatings by September 1, 1987. At Vista, we decided that the stipulation proposed in this fourth information request was appropriate and we determined that, rather than complying with the confusing and conflicting

demands for information in the June and July information requests, we would stipulate as provided for on page two of Exhibit 513.

30. Accordingly, Jerome Fischer, on or about August 4, 1987, mailed to the EPA our stipulation in response to the July 22, 1987, EPA letter. We believed at the time that this stipulation answered all of EPA's concerns. We heard nothing further from EPA about the June 19 and July 22, 1987, information requests from EPA in 1987, throughout 1988 and until May 1989.

31. In or about July or August 1987, I became aware that there was a possibility that Vista could continue to sell it 380 g/l VOC coatings in San Diego County even after September 1, 1987. This was important to Vista because it has retail outlets only in SCAQMD and SDAPCD which were the only Districts of California which were prohibiting 380 g/L VOC coatings. Therefore, absent a variance, Vista would be unable to sell its inventory of 380 g/L coatings. This information came to me though conversations in the industry and perhaps through advisories which we occasionally obtained from SDAPCD. As President of Vista, I was very concerned about our excess inventory of 380 VOC paint. I was concerned for two reasons. First, the disposal of several thousand gallons of 380 VOC paint would be a waste disposal problem that we would have to deal with at Vista. Secondly, Vista had approximately $60,000 of raw materials coast invested in this 380 g/L VOC paint. I estimate that our total inventory at Vista of the 380 VOC paint was approximately 13,000 gallons at this time. Importantly, these 13,000 gallons consisted of slow-moving inventory which Vista was unlikely to sell for many months, if not longer.

32. I have reviewed Exhibit 15. This was a letter that I authored and Vista sent to its customers to described our changes in our product line in order to comply with the new EPA directives.

33. I have reviewed Exhibit 193. These are notes from a meeting conducted on August 19, 1987, and attended by Jerome Fischer, Joe Ramirez, and myself. The purpose of this meeting was to make a management decision on which of our product lines had to be pulled from the he Vista inventory by the September 1, 1987, deadline. In addition, the meting was in order to discuss new labels for our products, as well as other information to be put on the he paint containers so that our customers cold also comply with the new EPA regulations. Finally, we were reviewing certain of our product lines to determine whether we would continue to manufacture them at the lower VOC limits mandated by EPA, or whether we would discontinue those lines entirely. Ultimately, as to Vista's slow-moving product lines, a corporate decision was made to not reformulate them, but rather to discontinue the product line entirely.

34. In or about August 1987, after many additional attempts, I was finally able to talk to William Wruble of the EPA by telephone. My primary reason for attempting to contact Mr. Wruble was to try to obtain from EPA permission or a variance to sell our inventory of approximately 13,000 gallons of 380 g/L VOC paint. I was particularly concerned because the EPA had given Vista and the other paint companies only two months to dispose of substantial excess inventory. I emphasized to Mr. Wruble that we did take EPA's deadline seriously and that we had in fact ceased manufacturing of 380 VOC paint by July 1. However, a deadline of September 1, 1987, was simply too short a time period for a small paint company like Vista to be able to properly dispose of its excess inventory without suffering severe economic consequences. During the conversation, Mr. Wruble mentioned that the SDAPCD separately enforced its regulation, and that I might wish to try to obtain a variance from SDAPCD. However, he held out little hope that I would be able to obtain such a variance. I emphasized to Mr. Wruble that it was important that Vista obtain some sort of variance so that we could sell our

excess inventory of 380 g/L VOC coatings. Based upon some prior information I had received from EPA and other environmental agencies, I was aware that the EPA and other regulatory agencies would on occasion allow companies and/or industry to pay a disposal fee or other compensation for the privilege of selling out-of-date products and/or causing other emissions of pollution. I discussed this with Mr. Wruble and inquired about the possibility of Vista paying a fee or some dollar amount to dispose of our products. Mr. Wruble said that he would check with his staff and EPA attorneys, but he did not hold out much hope that such a fee or penalty could be paid. Mr. Wruble never called me back to determine what he had learned from his conversations with staff and/or EPA lawyers about this issue.

35. I have examined Exhibit 16. This is an August 24, 1987, memorandum from myself and Mr. Jerome Fischer to all Vista Personnel. These were our instructions to our personnel to advise them of our compliance with the new EPA restrictions. The memorandum was designed t prevent the sale of 380 g/L VOC coatings after September 1, 1987, and further to advise our personnel as to which coatings could continue to be sold after that date.

36. In order to attempt to obtain a variance to sell our remaining inventory in San Diego County, I contacted SDAPCD sometime in August 1987. Eventually, I believe I talked to Mr. George Seidel. Mr. Seidel advised me that we did not have to remove our "nonconforming paint" from our inventory and that, while we were applying for a variance, SDAPCD would not "shop our stores." In other words, they would just disregard that we had that paint there. Mr. Seidel, or someone else from SDAPCD, provided us with a form with which to apply for a variance to sell our 380 G/L VOC paints in SDAPCD. Exhibit 20 is a copy of that form which was filled out in our offices in Fullerton and signed by me on August 31, 1987. I believe the documents was also filed on

August 31, 1987, in San Diego. Exhibit A to the variance application is a listing of the four Vista retail paint stores in San Diego County. Exhibit A to the variance application is a listing of the four Vista retail paint stores in San Diego County. Exhibit B once again shows our certification that we had ceased the manufacture of 380 g/L VOC paint by July 1, 1987.

37. I have examined Exhibit 764 which is a copy of the notice I received from the County of San Diego scheduling Vista's variance petition hearing for September 24, 1987.

38. I have reviewed Exhibit 19, which is a September 2, 1987, receipt from Vista's San Diego retail store. It appears to reflect the purchase of a one-gallon can of Trim-Kote mahogany paint. Our Trim-Kote mahogany for sale in our San Diego outlets during that time was 380 G/L VOC. However, I had understood from George Seidel that while our variance application was pending, we would not be found to be in violation of SDAPCD Rule 67. Exhibit 19 also has a handwritten note purportedly dated 9/18/87 and signed by George Seidel which claims to reflect a conversation between myself and Mr. Seidel. I do not recall this telephone conversation. Nor do I recall specifying the number of gallons or so-called non-complaint paint as 5,200 in San Diego County after September 1987. However, this seems to be a good approximation of the number of gallons of 380 G/L VOC paint which were on our shelves in our four San Diego stores in September 1987.

39. I have examined Exhibit 191 which purports to show that Vista sold a gallon of "Proformer" paint which had in excess of 250 g/L VOCs in the Los Angeles area in September 1987. However, the Proformer quick-dry enamel which was purchased and tested was a "quick-dry enamel" which the EPA allowed to have up to 400 g/l VOC. Therefore, Vista was not in violation of Rule 1113 by the sale of this gallon of Proformer paint.

40. On September 24, 1987, I attended a hearing by the SDAPCD to consider Vista's application for a variance to sell its remaining inventory in San Diego County. The Board deadlocked one vote to one vote and no decision was taken on my application. Therefore, we made a corporate decision not to further proceed with the variance application and instead immediately to remove the remainder of our 380 g/L VOC paints from our store shelves in our four retail locations in San Diego County. That inventory was then returned to our warehouse in Fullerton, California.

41. I have examined Exhibit 42, a September 29, 1987, violation from SDAPCD. I do not recall having received this violation on or about the date it bears. I am very certain that I did not receive this notice of violation by October 12, 1987, when I sent to Mr. Edward Slater at SDAPCD Exhibit 24 certifying that Vista had removed all of the 380 g/l non-conforming VOC paint from our four San Diego stores.

42. On or about October 14, 1987, I received a notice of violation from SDAPCD. This was a result of one of our stores being shopped and one gallon of 380 g/L VOC enamel being purchased from that store. I have examined Exhibit 21, and I recall receiving only the first page of this Exhibit. I did not receive the narrative statement which comprises the last page of this exhibit.

43. I have examined Exhibit 44 which is a copy of an October 19, 1987, letter from myself to Mr. Edward Slater at the SDAPCD. This letter was sent to Mr. Slater because I had just received the October 14, 1987, notice of violation which reflected that one of our San Diego stores had been shipped in September 1987. I was concerned because it had been my understanding, as reflected in the October 19, 1987, letter, that while our variance application was pending in San Diego we would not be held to be in violation of SDAPCD Rule 67. I

heard nothing further from Mr. Slater following my correspondence of October 19, 1987.

44. The reason we did not remove our 380 g/L VOC paints from our store shelves in San Diego immediately following the SDAPCD hearing on September 24, 1987, is because that Board did not reach a decision on my variance application. I felt, therefore, that the application was still pending. In fact, a further hearing on my application was scheduled for November 5, 1987. However, on October 30, 1987, after all of the 380 g/L VOC coatings had been taken from the store shelves in San Diego, I sent a letter to Mr. F.A.M. Buck advising him that Vista did not wish to pursue the variance application further. This is Exhibit 97.

45. I have examined Exhibits 25, 773, 27 and 28. These documents reflect correspondence between myself and SDAPCD. Ultimately, my dispute with SDAPCD for having sold two gallons of 380 g/L VOC paint was resolved by Vista paying $500 in full settlement for the violation. Following my letter to SDAPCD on February 4, 1988 (Ex. 28), I heard nothing further from SDAPCD.

46. On May 11, 1989, I was very surprised to receive Exhibit 562. This letter advised me for the first time in almost two years that the EPA was concerned about our efforts to comply with its series of confusing information requests in 1987. I was advised to contact Department of Justice attorney Gerald George to give him Vista's explanation. Immediately upon my receipt of that letter, I telephoned Mr. George to discuss the matter. I wanted to know what it would take to resolve this dispute. Mr. George insisted that I "give him a number" to resolve the case. I believed I offered $500 to settle the case. Mr. George did not accept the offer, but demanded further information from Vista.

47. At about that same time, I hired the San Francisco law firm of Heller, Erhman, White & McAuliffe to assist me in this matter. My then-attorney, Joseph Armao, was able to obtain from EPA attorney Gerald George a demand of $30,000 to resolve the case. Both Mr. Armao and I felt that this amount was far too much and we countered with an offer of $5,000. I had emphasized to Mr. George that I believed my dispute with the environmental agencies had been resolved with the payment of my $500 fine to SDAPCD in early 1988.

48. In response to Mr. George's further demand for information from Vista, I sent him a letter dated June 19, 1989 (Ex. 29). In addition, I provided him with a copy of the August 4, 1987, letter which we had sent previously to EPA (Ex. 13).

49. In addition, my attorney Mr. Armao provided Exhibit 783, a June 21, 1989, letter to Gerald George with a further response to questions Mr. George had about the substance of Vista's compliance with the 1987 information request. This letter further reflects the legal advice I was being given by Mr. Armao at this time that Vista had in fact fully complied with the EPA information requests dated in March, May, June and July 1987.

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50. On or about June 23, 1989, in a further attempt to provide EPA with all of the information it was apparently seeking, Mr. Armao at my direction sent a letter, Exhibit 784, to Mr. George. This letter also included a listing of our sales from Vista store No. 9 (our largest San Diego Vista retail store) and the number of gallons and a listing of the 380 g/L VOC paint which was sold during the month of September 1987. These figures had been compiled by Vista personnel over a

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[*] [So in original.]

several day period by reviewing thousands of sales invoices and receipts. In sum, the document established that no more than 35 gallons of so-called non-compliant paint was sold by this one store during that time. By extrapolation, I estimated that Vista sold no more than 70 gallons of non-compliant paints in its four San Diego retail stores.

51. On or about June 23, 1987, I was advised by my attorney Joseph Armao that he had received a letter from Gerald George, Exhibit 522. I understood then that this letter finally showed that the EPA was satisfied with the information that they had been purportedly seeking since June 1987. However, I was very surprised to learn that the EPA's $30,000 demand had risen substantially to a new demand of $192,000. I was very confused about the alleged "economic benefit" that Vista had supposedly enjoyed from the sale of 70 gallons of so-called non-complying paint. I was further confused about EPA's application of various other penalty factors which had not been previously made known to me.

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52. I had further discussions with Mr. Armao and he advised me that this settlement demand was exorbitant and should not be paid.

53. I did not formally reject the demand of Mr. George. I did not hear anything further from the EPA or the Department of Justice until December 1990 when Vista was served with the instant lawsuit. I was stunned to find that the EPA continued to allege that they had not received the information they had

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[*] [So in original.]

[*] [So in original.]

purportedly been seeking from Vista since June 1987. This was especially troubling to me because Mr. George had represented in June 1989 that the EPA had received all the information it had been demanding.

54. In or about January 1991, Vista retained the law firm of Donnelly, Clark, Chase & Smiland in order to represent Vista in its litigation with the EPA and the Department of Justice. During the course of the litigation over the next 11 months, I relied exclusively on this law firm to advise me how to respond to the complaint as well as to the many demands for discovery which were made by the government of Vista. During the course of the litigation in 1991, I learned from Messrs. Smiland and/or Newell of the Donnelly, Clark firm that the government was demanding access to certain Vista records. These records seemed to be the same records the government had been seeking in its June 1987 information request. Mr. Newell and/or Mr. Smiland advised me that, in their view, the government should be estopped from claiming Vista had failed to respond to the June 1987 information request. However, based upon the advice of our attorneys, Vista made a decision to give government attorneys and their staff full access to all of the business records of Vista.

55. On October 25, 1991, Assistant U.S. Attorney Peter Hsiao and Assistant U.S. Attorney Scott Park came to the Vista headquarters in Fullerton. I escorted them to Vista's document warehouse. AUSAs Hsiao and Park had full access to our document warehouse for a full day. AUSAs Hsiao and Park specified particular records that they wanted copied and we made copies for them. I assigned a Vista employee to assist AUSAs Hsiao and Park in whatever way he could for a full day.

56. During the visit to our facility by AUSAs Hsiao and Park, I had several conversations with AUSA Hsiao. During those conversation, AUSA Hsiao said that in his view the case

was worth $100,000 and he urged me to pay that amount to resolve the dispute. I replied that the case was not worth $100,000, but that $40,000 was a figure that Vista might be willing to pay. AUSA Hsiao said that he felt that might be an appropriate figure, but that other government officials would not accept less than $100,000.

57. During his visit to the Fullerton facility in October 1987, Mr. Hsiao and/or Mr. Park never advised me that there were missing documents. Never did they advise me that there were "missing" sales receipts. Indeed, none of the gentlemen representing the government who were at our facility that day ever indicated that there were any documents which they were seeking which were not made available to them. To this day, I do not believe that there are any incomplete or missing documents.

58. In or about October 1991, I traveled to San Francisco to meet with EPA attorney Letitia Moore. I believe one other individual was also present at that meeting, although I do not remember that person's name. Once again, I offered to settle this matter for $40,000, but Ms. Moore demanded a "six figure" settlement.

59. On or about October 25, 1991, I was advised by my attorneys that the government had filed a motion for summary judgment against Vista. At some point, I was advised that one of the bases for the summary judgment motion was that Vista was supposedly continuing to withhold information from the government. This was especially surprising to me because we had just provided AUSAs Hsiao and Park with full access to all Vista documents.

60. Between October 25, 1991, and November 18, 1991, I was out of the Los Angeles area for a good part of that time. However, my attorneys assured me that there were so many

substantial and triable issues of fact that it was highly unlikely that a summary judgment would be entered against Vista.

61. I was advised by telephone on or about November 18, 1991, that a $3.1 million summary judgment had been entered against Vista. I was completely stunned by that result. As a result of that judgment and the publicity which followed, morale at Vista dropped tremendously. Employees were concerned that Vista might be driven out of business and that they would lose their jobs. Customers also contacted me and other Vista employees and suggested that they could no longer do business with us because of the adverse publicity. In fact, our business was very slow in November and December 1991 and this slow period continued into the early parts of 1992. While some of that may be attributable to a seasonal drop in sales, I believe that a portion of this was also attributable to the substantial adverse publicity that Vista received. In addition, I and other Vista employees received threatening telephone calls and there was vandalism to our corporate headquarters in Fullerton.

62. At all times, it was Vista's policy to fully, completely and promptly reply to any and all government demands for information, whether from environmental agencies or from the Department of Justice.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 28 day of April 1994 at Los Angeles, California.

/s/ Eddie R. Fisher
Eddie R. Fischer

APPENDIX F

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Attorneys for Plaintiff
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISTA PAINT CORPORATION,

Defendant.

No. CV 90-6449-AWT(GHKx)

~~[PROPOSED~~ AMENDED~~]~~
PRE-TRIAL CONFERENCE ORDER

Pre-Trial Conference
Date: December 20, 1993
Time: 10:00 a.m.

Pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of the Central District of California,

IT IS ORDERED:

1. The parties are plaintiff United States of America ("United States") and defendant Vista Paint Corporation ("Vista"). Vista has been served and has appeared by filing its answer in this case. The pleadings and court orders which raise the issues are:

(1) the Complaint for Injunctive Relief and Civil Penalties, filed December 3, 1990;

(2) the Answer to Complaint for Injunctive Relief and Civil Penalties and Counterclaim for Declaratory and Injunctive Relief, filed March 28, 1991;

(3) Amended Findings of Uncontroverted Facts and Conclusions of Law in Support of United States Motion for Summary Judgment, filed February 11, 1992; and

(4) the Ninth Circuit Memorandum Opinion, filed September 24, 1992.

The United States contends that the District Court's Order Dismissing Defendant's Counterclaim, Dismissing Defendant's Third Party Complaint, and Striking Certain Affirmative Defenses, filed July 23, 1991, also applies here.

2. Federal jurisdiction and venue are invoked upon the grounds:]

(1) This Court has subject matter jurisdictions over this action pursuant to Section 113(b) of the federal Clean Air Act ("CAA"), 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1331, 1345 and 1355, and personal jurisdiction over the parties herein. Vista does not contest this Court's subject matter jurisdiction.

(2) Venue in this district is proper pursuant to 42 U.S.C. § 7413 and 28 U.S.C. § 1391(c) in that Vista's principal place of business is in this district.

3. The United States estimates that the trial will require three days or less, with the use of narrative statements for direct testimony with the declarant made available for cross examination. Vista estimates that the trial will take approximately six court days.

4. The trial is to be a non-jury trial. At least one (1) week prior to the trial date, each counsel shall submit to the court and opposing counsel the findings of fact and conclusions of law which the party expects the Court to make upon proof at the time of trial as required by Local Rule 13.5.

***

DATED: JAN 03 1994, 1993[*]

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
UNITED STATES DISTRICT
JUDGE

APPROVED AS TO FORM AND CONTENT:

DATED: 12/13/93

LOIS J. SCHIFFER
Acting Assistant Attorney General
GERALD F. GEORGE
KENNETH RIEMER

TERREE A. BOWERS
United States Attorney
LEON W. WEIDMAN
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/s/ Peter Hsiao
PETER HSIAO
Assistant United States Attorney

LETITIA D. MOORE
U.S. Environmental Protection Agency

Attorneys for Plaintiff
UNITED STATES OF AMERICA

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[*] [Original includes erroneous reference to 1993.]

DATED: 12/10/93

DONALD C. SMALTZ
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and

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By /s/ William F. Fahey
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VISTA PAINT CORPORATION

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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISTA PAINT CORPORATION,

Defendant.

NO. CV 90-6449-R

Date: February 3, 1991
Time: 10:00 a.m.

~~[PROPOSED]~~ AMENDED FINDINGS OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT

Plaintiff United States of America's motion for summary judgment came on regularly for hearing on November 18, 1991, Chief United States District Court Judge Manuel L. Real presiding. Subsequently, defendant's Motion for Findings Of Fact and For Relief From And Amendment Of The Judgment came on regularly for hearing on February 3, 1992. After having heard the arguments of counsel and examined the pleadings, memorandum and exhibits presented by the plaintiff and defendants, the Court makes the following amended findings of fact and conclusions of law:

STATEMENT OF UNCONTROVERTED FACTS

1. Vista is a major manufacturer, distributor and retail seller of paint. It manufactures approximately 25,000 gallons of paint each month for sale at its stores in California, and its total sales last year exceeded 50 million dollars. Vista's general office and its sole paint manufacturing plant are located in Fullerton, California. Vista sells its paint at its own stores in

Stanton, Costa Mesa, La Habra, Orange, Mission Viejo, Ontario, Riverside, El Cajon, Chula Vista, Huntington Beach, and San Diego, California.

2. In 1984, as part of the State Implementation Plan ("SIP") for California to limit the VOC content of paint, the South Coast Air Quality Management District ("SCAQMD") and the San Diego County Air Pollution Control District SDCAPCD") adopted SIP Rules 1113 and 67.0. These rules regulate non-flat architectural coatings, otherwise known as gloss or semi-gloss paints, which are commonly used to paint structures, mobile home or pavement. In order to control air pollution from the manufacture and application of these coatings, the rules limit their VOC content to no more than 250 grams of VOC per liter of coating ("250 g/l VOC"), and forbid the sale, offer for sale, or application of any such paint exceeding these VOC limitations ("non-compliant coatings").

***

IT IS SO ORDERED
Dated: 2-11-92

/s/ Manuel L. Real
HON. MANUEL L. REAL
CHIEF UNITED STATES
DISTRICT JUDGE

Presented by:

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISTA PAINT CORPORATION,

Defendant.

NO. CV 90 6449 R

COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES

(CLEAN AIR ACT, 42 U.S.C. §§ 7401, et seq.)

Filed December 3, 1990

COMPLAINT

The United States of America ("Plaintiff"), by and through its undersigned attorneys, by the authority of the Attorney General of the United States, and at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges that:

INTRODUCTION

1. This is a civil action for injunctive relief and for civil penalties for violations by Vista Paint Corporation ("Vista"), of the Clean Air Act, 42 U.S.C. § 7401 et seq. ("the Act"), EPA regulations promulgated under the Act, and applicable portions of the federally approved California State Implementation Plan ("SIP") regulating emissions of volatile organic compounds ("VOCs").

2. Plaintiff seeks to enjoin Vista from violating the SIP at its California facilities which are located in the South Coast Air Quality Management District ("SCAQMD") and the San Diego Air Pollution Control district ("SDAPCD").

JURISDICTION AND PARTIES

3. This court has jurisdiction over this action pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b), and pursuant to 28 U.S.C. §§ 1331, 1345 and 1355.

4. Venue properly lies in this District pursuant to Section 113(b) of the Act, 42 U.S.C. 7413(b), and 28 U.S.C. § 1391(c).

5. Pursuant to Section 113(b) of the Act, 42 U.S.C. 7413(b), notice of the commencement of this action has been given to the State of California through the California Air Resources Board.

6. Vista is a corporation organized under the laws of the State of California, with its headquarters located in Fullerton, California. Vista owns and operates an architectural coatings manufacturing facility in Fullerton, California, and numerous retail sales facilities throughout the SDAPCD and SCAQMD.

7. At all times relevant hereto, Vista has sold and offered for sale within the SCAQMD and SDAPCD architectural coatings which contain volatile organic compounds ("VOCs"). VOCs are precursors to ozone, an air pollutant.

8. Vista is a "person" within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e).

STATE IMPLEMENTATION PLAN

9. Section 109 of the Act, 42 U.S.C. § 7409, requires the EPA Administrator ("Administrator") to promulgate primary and secondary ambient air quality standards for air pollutants, including ozone. On February 8, 1979, primary and secondary National Air Quality Standards ("NAAQS") for ozone were promulgated and published at 40 C.F.R. § 50.9.

10. Vista's manufacturing facility and its sales facilities for architectural coatings are located in areas in which the primary NAAQS for ozone has not been attained. 40 C.F.R. § 81.305.

11. Section 110 of the Act, 42 U.S.C. § 7410, requires the Administrator to approve any SIP for the implementation, maintenance and enforcement of such ambient air quality standards within specified time limits. Upon approval, the SIP can be enforced by the federal government under Section 113(b) of the Act, 42 U.S.C. § 7413(b).

12. On January 24, 1985, the Administrator approved SDAPCD Rule 67.0 and SCAQMD Rule 1113 as part of the SIP submitted by the State of California. 50 Fed. Reg. 3338 (January 24, 1985).

13. SDAPCD Rule 67.0 and SCAQMD Rule 1113 set limits on the VOC content of architectural coatings manufactured after September 2, 1985 that are sold and offered for sale within those districts.

FIRST CLAIM FOR RELIEF

14. Paragraphs 1-13 of this Complaint are incorporated herein by reference as if fully alleged below.

15. On or about June 19, 1987, and pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(a)(1), EPA issued to Vista a Notice of Violation ("NOV") informing Vista that it was in violation of SDAPCD Rule 67.0 and SCAQMD Rule 1113. A true and correct copy of that NOV is attached hereto as Exhibit A and incorporated herein.

16. Vista has continued to violated[*] SDAPCD Rules 67.0 and SCAQMD Rule 1113 more than thirty (30) days after issuance and receipt of the NOV.

17. Under Section 113(b) of the Act, 42 U.S.C. § 7413(b), Vista is liable for civil penalties of up to $25,000 for each day of violation of either SDAPCD Rule 67.00 or SCAQMD Rule 1113.

SECOND CLAIM FOR RELIEF

18. The allegations of Paragraphs 1-13 of this Complaint are incorporated by reference herein as if fully alleged below.

19. On or about June 19, 1987, the Administrator sent a demand for information to Vista, pursuant to Section 114 of the Act, 42 U.S.C. § 7414. On or about June 24, 1987, Vista received this information demand from the Administrator.

20. Vista has failed to supply the information specified by the Administrator in EPA's June 19, 1987 information demand to Vista.

21. Under Section 113(b) of the Act, 42 U.S.C. § 7413(b), Vista is liable for civil penalties of up to $25,000 for each day of failure to comply with the Administrator's information demand.

RELIEF REQUESTED

Wherefore, Plaintiff United States of America respectfully prays this Court to grant the following relief:

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[*] [So in original.]

A. Imposition of civil penalties of $25,000 per violation for each day Vista has violated the Clean Air Act, SDAPCD Rule 67.0 and SCAQMD Rule 1113;

B. Entry of a permanent injunction against Vista requiring it to cease violating the Clean Air Act and regulations promulgated thereunder, including SCAQMD Rule 1113 and SDAPCD Rule 67.0;

C. Award of the costs of this action against defendant and in favor of the United States of America; and

D. Such further relief as this Court may deem just and proper.

Respectfully submitted,

/s/ [illegible] for
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APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISTA PAINT CORPORATION,

Defendant.

NO. CV 90-6449 AWT

SUPPLEMENTAL SCHEDULING ORDER

This order supplements the pretrial conference order and the order re further pretrial conference, both filed January 3, 1996.

IT IS ORDERED:

1. All in limine motions shall be filed and served by March 25, and shall be noticed for hearing on April 18, 1994, at 10:00 a.m.

2. A status conference to discuss readiness for trial shall also be held on said date and time.

3. Trial is set to commence on May 23, 1994, at 1:30 p.m.

4. The direct testimony of all non-adverse witnesses shall be presented by declaration or deposition extract. The

testimony of adverse witnesses may be presented by deposition (or the witnesses called in person). All such direct testimony declarations and deposition transcript excerpts shall be filed and served not later than May 2. This requirement does not apply to rebuttal witnesses.

5. Any party desiring to cross-examine any witness whose direct testimony has been presented by declaration shall, not later than May 16, file and serve a Notice of Request To Cross-Examine Witness(es), listing the witnesses the party desires to cross-examine. All witnesses so designated in a timely Notice of Request to Cross-Examine shall be made available at trial for cross-examination. If not so made available, the direct testimony of such witness shall be stricken. Witnesses not so designated need not be produced at trial.

The designation of witnesses for cross-examination shall be made in good faith. Any designation not made in good faith or which is found to be frivolous may subject designating counsel to sanctions. E.g., 28 U.S.C. § 1927.

Dated: February 28, 1994

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ROBERT J. TIMLIN,
DISTRICT JUDGE PRESIDING

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

VISTA PAINT CORPORATION,

DEFENDANT.

CASE NO. ED CV 94-127-RT

VOLUME IV

COURT TRIAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA
FRIDAY, APRIL 28, 1995

DOROTHY BABYKIN
PRO TEM COURT REPORTER
419J - U. S. DISTRICT COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

* * *

MR. WAHL: IT SEEMS FUNDAMENTALLY UNFAIR. THEY'VE HAD A CHANCE TO REVIEW OUR DECLARATIONS AND PRESENT A WITNESS ON THE POINT, BUT WE CAN'T DO THAT.

I MEAN, I GUESS WHAT'S SUGGESTED HERE BY ANALOGY IS THAT WE CAN'T USE MR. MAHAN FOR THE VERY REASON THAT HE WAS ONE OF OUR WITNESSES FOR OUR CASE IN CHIEF. BUT IF WE HAD CALLED ANOTHER ECONOMIST, AS THEY HAVE CALLED THEIR DR. MC KEE, THE SCIENTIST, THAT THAT ECONOMIST COULD HAVE BEEN A REBUTTAL WITNESS.

SO SOMEHOW WE'VE USED MR. MAHAN IN OUR CASE IN CHIEF, BUT NOW HE'S PRECLUDED FROM BEING THE SO-CALLED REBUTTAL WITNESS. THAT DOESN'T RING FAIR, YOUR HONOR.

THE COURT: ALL I CAN SAY IS THE WAY THIS PROCESS HAS UNRAVELED IN THIS CASE, THIS IS MY FIRST EXPERIENCE WITH EVIDENCE ON DECLARATIONS SIMULTANEOUSLY FILED. THIS IS A CLASSIC PILOT PROGRAM FOR RECONSIDERATION OF ALLOWING TESTIMONY BY DECLARATIONS. BUT THAT'S THE WAY IT IS.

IT WASN'T WRITTED. HIS RULING WASN'T TAKEN UP TO THE NINTH CIRCUIT FOR REVIEW AS TO WHETHER IT WAS APPROPRIATE. BUT MAYBE YOU'LL HAVE AN OPPORTUNITY -- WHOEVER WANTS TO APPEAL WHATEVER THE RESULTS ARE BY THIS

COURT, YOU CAN RAISE THAT ON APPEAL. IT'S A CONSTITUTIONAL PROBLEM.

* * *

APPENDIX K

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ROBERT J. TIMLIN,
DISTRICT JUDGE PRESIDING

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

VISTA PAINT CORPORATION,

DEFENDANT.

CASE NO. ED CV 94-127-RT

VOLUME VII

COURT TRIAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA
THURSDAY, MAY 4, 1995

DOROTHY BABYKIN
PRO TEM COURT REPORTER
429J - U. S. DISTRICT COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012
LOS ANGELES, CALIFORNIA

THURSDAY, MAY 4, 1995; 8:40 A.M.

* * *

THE COURT: CALL THE CASE OF THE UNITED STATES OF AMERICA VERSUS VISTA PAINT CORPORATION. THE PARTIES -- ALL COUNSEL ARE PRESENT AS WELL AS MR. EDDIE FISCHER.

BEFORE WE RETURN TO RULING ON OBJECTIONS TO THE REMAINING EXHIBITS, TO WHICH OBJECTIONS ARE STILL PENDING, THE COURT'S GOING TO NOW STATE ITS RULING ON THE ISSUE WHICH WAS BRIEF BY THE PARTIES REGARDING THE QUESTION OF WHETHER THERE'S A BURDEN OF PROOF AT THE TRIAL OF PENALTIES -- PENALTY.

MS. BREMER: YOUR HONOR, IF I MAY.

THE COURT: YES.

MS. BREMER: I THINK THE QUESTION -- CERTAINLY TO THE EXTENT THAT WE UNDERSTOOD AND BRIEFED IT -- WAS THE QUESTION OF STANDARD OF PROOF.

THE COURT: THAT'S CORRECT. AND READING THE CASES, I'VE CONCLUDED THAT IF THERE IS NO BURDEN OF PROOF, THERE'S NO STANDARD.

(LAUGHTER.)

THE COURT: I'M BROADENING THE ISSUE TO GIVE YOU A BROADER RULING.

THE COURT CONCLUDES THAT THE PENALTIES PROVIDED IN THE CLEAN AIR ACT FOR VIOLATIONS OF THE CLEAN AIR ACT ARE CIVIL IN NATURE. THEY ARE NOT CRIMINAL OR QUASI CRIMINAL.

THE COURT FURTHER CONCLUDES THAT UNDER THE CLEAN AIR ACT, THERE IS NO BURDEN OF PROOF ON EITHER PARTY IN A TRIAL, WHICH IS SOLELY ON THE ISSUE OF THE AMOUNT OF CIVIL PENALTIES, IF ANY, WHICH THE COURT WILL ORDER THE DEFENDANT TO PAY.

BASED ON THE CONCLUSION THAT THERE'S NO BURDEN OF PROOF IN THIS PARTICULAR TRIAL, THE COURT DEEMS THE ISSUE OF THE STANDARD OF THE BURDEN OF PROOF TO BE MOOT.

ONCE THE LIABILITY FOR PAYMENT OF THE PENALTY IS DETERMINED BY THE COURT, AND THE COURT AT A LATER TRIAL ON THE PENALTY ISSUE RECEIVES ADMISSIBLE EVIDENCE FROM BOTH SIDES, AND THEN EXERCISES ITS DISCRETION IN DETERMINING THE AMOUNT, IF ANY, OF THE PENALTY AFTER WEIGHING AND BALANCING THE PROPER STATUTORY AND COMMON LAW FACTORS AGAINST THE FACTS WHICH IT FINDS FROM ALL THE EVIDENCE ADMITTED AT TRIAL, IS THE GOVERNING PRINCIPLE AS TO HOW THE COURT CONSIDERS THE DECISION-MAKING PROCESS AND ALSO HAS GUIDED THE COURT IN ARRIVING AT ITS CONCLUSION THAT THERE'S NO BURDEN OF PROOF IN THIS PARTICULAR TRIAL.

NOW, THAT WILL IMPACT THE ORDER OF ARGUMENT. THERE WILL BE CLOSING ARGUMENT, BUT THERE WILL BE ONLY TWO CLOSING ARGUMENTS. AND IT'S MY UNDERSTANDING THAT

THE ARRANGEMENT'S ARE THAT THE GOVERNMENT WILL MAKE THE FIRST CLOSING ARGUMENT.

* * *

APPENDIX L

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Plaintiff United States of America

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISTA PAINT CORPORATION,

Defendant.

VISTA PAINT CORPORATION,

Counterclaimant,

v.

UNITED STATES OF AMERICA,

Counterdefendant.

VISTA PAINT CORPORATION,

Third Party Plaintiff,

v.

ENVIRONMENTAL PROTECTION AGENCY; CALIFORNIA AIR RESOURCES BOARD; TECHNICAL REVIEW GROUP; SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; SAN DIEGO AIR POLLUTION CONTROL DISTRICT,

Third Party Defendants.

No. CV 90-6449 (R)

~~PROPOSED~~ ORDER DISMISSING DEFENDANT'S COUNTERCLAIM, DISMISSING DEFENDANT'S THIRD PARTY COMPLAINT, AND STRIKING CERTAIN AFFIRMATIVE DEFENSES

The motion of plaintiff United States of America to dismiss defendant Vista Paint Corporation's counterclaim and to strike certain affirmative defenses in this action, and the motions of the third party defendants, Environmental Protection Agency, California Air Resources Board, Technical Review Group, South Coast Air Quality Management District and San Diego Air Pollution Control District, to dismiss defendant's third party complaint in this action, came on regularly for hearing before this Court on June 17, 1991. Appearing on behalf of plaintiff United States of America and third party defendant Environmental Protection Agency were Stephen M. Johnson and Peter Hsiao. Appearing on behalf of the third party defendant South Coast Air Quality Management District was Barbara Baird. Appearing on behalf of the third party defendant San Diego Air Pollution Control District was Miriam Milich. Appearing on behalf of the third party defendants Technical Review Group and California Air Resources Board was Norman N. Flette. Appearing on behalf of the defendant and third party plaintiff was William H. Smiland. After considering the moving and opposition papers, the arguments of counsel and all other matters presented to the Court:

IT IS HEREBY ORDERED that:

1. The motions of the third party defendants Environmental Protection Agency, South Coast Air Quality Management District, San Diego Air Pollution Control District, California Air Resources Board and Technical Review Group to dismiss defendant Vista Pain[*] Corporation's third party complaint are granted in their entirety and the third party complaint is dismissed with prejudice with respect to all third party defendants based upon the following grounds:

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* [So in original.]

a. The Court lacks subject matter jurisdiction to review the claims raised in the third party complaint;

b. The claims asserted by the defendant in the third party complaint fail to state a claim upon which relief can be granted.

2. Plaintiff United States of America's motion to dismiss defendant's counterclaim is granted in its entirety and the counterclaim is dismissed with prejudice based upon the following grounds:

a. The Court lacks subject matter jurisdiction to review the claims raised in the counterclaim;

b. The claims asserted by the defendant in the counterclaim fail to state a claim upon which relief can be granted;

3. Defendant's First through Sixth, Eighth, Twelfth, Thirteenth, and Fifteenth through Eighteenth purported affirmative defense, inclusive, are stricken in their entirety.

DATED: This 23rd day of ~~June~~ July, 1991

/stamp/ MANUEL L. REAL
MANUEL L. REAL
Chief United States District Judge

Submitted by:

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SCOTT H. PARK
Assistant United States Attorney

/s/ Peter Hsiao _____ Date 6-21-91
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Attorneys for Plaintiff United States of America and
Third Party Defendant Environmental Protection Agency

PETER M. GREENWALD
District Counsel

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* * *